that the building is protected, just as building owners generally bear a variety of obligations and responsibilities regarding safety standards and protection of their property.[159]

65. We find that permitting carriers to locate the demarcation point at or near the property line promotes a competitive telecommunications marketplace. We believe it would impede the development of facilities-based competition if a carrier could refuse a premises owner's request to move the demarcation point to the property line in order to prevent the connection of inside wiring to a competitive carrier. We further note the absence of reports that property owners are experiencing problems, or evidence that problems are likely to arise in relation to locating the demarcation point at the property line. Thus, we see no justification for imposing a requirement compelling carriers to inform property owners of the potential for problems, and we refrain from doing so.

5. Prospective Effect of 1997 Demarcation Point Order

66. The Commission's rules state that the demarcation point for multiunit structures is to be determined "in accordance with the local carrier's reasonable and non-discriminatory standard operating practices."[160] In the *1997 Demarcation Point Order* the Commission clarified that the standard operating practices to which Section 68.3(b)(1) refers are those practices in effect on August 13, 1990.[161] Thus the rule does not authorize changing the demarcation point for an existing building to the minimum point of entry, except pursuant to Section 68.3(b)(2), *i.e.*, if the building owner makes major additions, modifications, or rearrangements in existing wiring. Bell Atlantic/NYNEX requests that the Commission give its clarification in the *1997 Demarcation Point Order* only prospective effect so that buildings in which the demarcation point were improperly moved after Section 68.3(b)(1) was adopted, but before the rules were clarified in the *1997 Demarcation Point Order*, would not be affected.[162] Alternatively, Bell Atlantic/NYNEX asks the Commission to reconsider this portion of the *1997 Demarcation Point Order* to give the proposed interpretation only prospective effect.

67. In the *1990 Demarcation Point Order and Further NPRM*[163] the Commission adopted rules to ensure that the demarcation point would not be located a significant distance from where wiring enters the customer's premises. In the *1997 Demarcation Point Order,* the Commission clarified that it did not intend in the *1990 Demarcation Point Order and Further NPRM* to permit carriers automatically to relocate demarcation points in multiunit buildings.[164] According to Bell Atlantic, some carriers interpreted the rules promulgated in the *1990 Demarcation Point Order and Further NPRM* to permit relocation of the demarcation point to the minimum point of entry, so long as that relocation was approved by the applicable state commission. Accordingly, Bell Atlantic filed tariffs with state

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[159] Bell Atlantic/NYNEX Comments on *1997 Demarcation Point Order* at 3; GTE Reply Comments on *1997 Demarcation Point Order* at 4; SCS Comments on *1997 Demarcation Point Order* at 2-3.

[160] Section 68.3(b)(1) states, in relevant part, "[i]n multiunit premises existing as of August 13, 1990, the demarcation point shall be determined in accordance with the local carrier's reasonable and non-discriminatory standard operating practices." 47 C.F.R. § 68.3(b)(1).

[161] *See 1997 Demarcation Point Order*, 12 FCC Rcd at 11914; 47 C.F.R. § 68.3(b)(1).

[162] Bell Atlantic Petition.

[163] *See 1990 Demarcation Point Order and Further NPRM.*

[164] *1997 Demarcation Point Order,* 12 FCC Rcd at 11914.

commissions, and in five jurisdictions, the state public utility commissions permitted Bell Atlantic to locate the demarcation point for all multiunit buildings at the MPOE.[165]

68. Although Bell Atlantic does not challenge the demarcation point location rules as clarified by the Commission in the *1997 Demarcation Point Order*, it pleads that it was not unreasonable for it and other carriers to have adopted a different interpretation in 1990. Bell Atlantic claims that it would be impossible now, seven years after the fact, for it to "unscramble the egg" and attempt to restore the demarcation points to the original 1990 locations in multiunit buildings in the five affected jurisdictions. Bell Atlantic also reports that the wiring in question has been fully amortized, control and maintenance of the wiring has been turned over to the building owners, and that those owners have likely modified, rearranged, or added to it. Bell Atlantic claims to have no way of knowing whether any such rearrangements or modifications were made, or which were "major," so as to take the building out of the pre-1990 category. Bell Atlantic states that it would be unreasonable to hold it responsible for maintaining wiring that building owners have controlled and maintained, properly or not, for several years. Furthermore, Bell Atlantic argues that moving demarcation points to the MPOE conforms to Commission policy. Finally, Bell Atlantic argues that it should not be penalized for actions taken in good faith and consistent with the Commission's substantive policy, even if those actions are inconsistent with the rule as clarified seven years after it was promulgated.

69. We grant Bell Atlantic's request, and clarify that the statement in paragraph 26 of the *1997 Demarcation Point Order* was intended to have only prospective effect, and does not require carriers to reestablish demarcation points moved under Section 68.3(b)(1) before clarification in the *1997 Demarcation Point Order*. Although our policy supports deference to building owners' choice of location for demarcation points, we recognize the difficulty of determining which demarcation point locations were improperly moved, and note the state public utilities commission approval of the policies under which the demarcation points were moved, indicating that the public interest had been adequately considered before the relocation activity took place. Thus, we find that the public interest will be better served by clarifying that our statement in paragraph 26 of the *1997 Demarcation Point Order*, regarding moving the demarcation point to the MPOE, was intended to have only prospective effect. Reversing the relocations and moving the demarcation point away from the MPOE appears unjustified, would contradict the Commission's policy of supporting location of the demarcation at or near the MPOE, and would be difficult to implement. Finally, there is no indication that granting Bell Atlantic's request will undermine the Commission's support for a competitive telecommunications market and facilities-based competition.

D. Access to Conduits and Rights-of-Way

1. Background

70. Section 224 of the Communications Act provides that "[a] utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."[166] Congress enacted the original version of Section 224 in 1978 to ensure that utilities' control over poles and rights-of-way did not create a bottleneck that would stifle the growth of cable television systems that use poles and rights-of-way. Congress sought to prohibit utilities from engaging in "unfair pole attachments practices . . . and to minimize the effect of

[165] The demarcation point in multiunit buildings was moved to the minimum point of entry in Pennsylvania, Maryland, Virginia, West Virginia and Delaware.

[166] 47 U.S.C. § 224(f)(1).

unjust or unreasonable pole attachments practices on the wider development of cable television service to the public."[167] In 1978, the Commission implemented the original Section 224 by issuing rules governing pole attachments issues and establishing a basic formula for cable pole attachments rates.[168] These rules have been reconsidered, amended and clarified by subsequent Commission orders.[169]

71. The 1996 Act amended Section 224 in important respects. While previously the protections of Section 224 had applied only to cable operators, the 1996 Act extended those protections to telecommunications carriers as well.[170] Further, the 1996 Act gave cable operators and telecommunications carriers a mandatory right of access to utility poles, in addition to maintaining a scheme to assure that the rates, terms and conditions governing such attachments are just and reasonable.[171] Thus, in passing the 1996 Act, Congress intended to ensure that utilities' control over poles, ducts, conduits, and rights-of-way did not create a bottleneck for the delivery of telecommunications services.

72. As amended by the 1996 Act, Section 224 defines a utility as one "who is a local exchange carrier or an electric, gas, water, steam, or other public utility and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for wire communications."[172] Section 224, however, specifically excludes incumbent LECs from the definition of telecommunications carriers with rights as pole attachers.[173] Because, for purposes of Section 224, an incumbent LEC is a utility but is not a telecommunications carrier, an incumbent LEC must grant other telecommunications carriers and cable operators access to its poles, ducts, conduits, and rights-of-way, even though the incumbent LEC has no rights under Section 224 with respect to the facilities of other utilities. This is consistent with Congress'

[167] S. Rep. No. 580, 95th Cong., 1st Sess. at 19, 20 (1977) (1977 Pole Attachments Act Senate Report).

[168] Adoption of Rules for the Regulation of Cable Television Pole Attachments, CC Docket No. 78-144, *First Report and Order*, 68 FCC 2d 1585 (1978); *see also Second Report and Order*, 72 FCC 2d 59 (1979) (*Pole Attachments Second Report and Order*); *Memorandum Opinion and Order in CC Docket No. 78-144*, 77 FCC 2d 187 (1980), *aff'd sub nom Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1985); Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, CC Docket No. 86-212, *Report and Order*, 2 FCC Rcd 4387 (1987) (*1987 Pole Attachments Revisions Order*).

[169] *Pole Attachments Second Report and Order*, 72 FCC 2d at 59; Petition to Adopt Rules Concerning Usable Space on Utility Poles, RM 4556, *Memorandum Opinion and Order*, FCC 84-325, at ¶ 10 (rel. July 25, 1984). *See also Alabama Power Co. v. FCC*, 773 F.2d 362 (D.C. Cir. 1985) (upholding challenge to the Commission's pole attachments formula relating to net pole investment and carrying charges). Following *Alabama Power*, the Commission revised its rules in the *1987 Pole Attachments Revisions Order*, 2 FCC Rcd at 4387. *See also* Amendment of Rules and Policies Governing Pole Attachments, *Report and Order*, CS Docket No. 97-98, 15 FCC Rcd 6453 (2000) (*Cable Pole Attachments Pricing Report and Order*); Implementation of Section 703(e) of the Telecommunications Act of 1996, CS Docket No. 97-151, *Report and Order*, 13 FCC Rcd 6777 (1998) (*Telecommunications Pole Attachments Pricing Report and Order*), *rev'd in part sub nom Gulf Power Co. v. FCC*, 208 F.3d 1263 (11th Cir. 2000) (*Gulf Power II*).

[170] 47 U.S.C. § 224, as amended by the 1996 Act, § 703.

[171] 47 U.S.C. § 224(a), (f). *See Gulf Power Co. v. United States*, 187 F.3d 1324 (11th Cir. 1999) (upholding the constitutionality of Section 224(f)(1)) (*Gulf Power I*).

[172] 47 U.S.C. § 224(a).

[173] 47 U.S.C. § 224(a)(5).

intent that Section 224 promote competition by ensuring the availability of access to new telecommunications entrants.[174]

73. Under the pole attachments provisions of the 1996 Act, we have been able to act effectively to promote the development of competition in local telecommunications markets. In the *Local Competition First Report and Order*, we established a program for nondiscriminatory access to utilities' poles, ducts conduits and rights-of-way, consistent with our obligation to institute a fair, efficient and expeditious regulatory regime for determining just and reasonable attachments rates, terms and conditions with a minimum of administrative costs.[175] We further held that the scope of a utility's ownership or control of an easement or right-of-way is a matter of state law, and determined that the access obligations of Section 224(f) apply when, as a matter of state law, the utility owns or controls the right-of-way to the extent necessary to permit such access.[176] In the *Local Competition Pole Attachments Reconsideration Order*, we reiterated that the principle of nondiscrimination established by Section 224(f)(1) requires a utility to take all reasonable steps to expand capacity to accommodate requests for attachments just as it would expand capacity to meet its own needs.[177] We concluded, however, that a utility is not required to exercise its powers of eminent domain, if any, on behalf of third parties in order to expand its existing rights-of-way.[178]

74. In the *Local Competition First Report and Order*, we also held that Section 224 does not mandate that a utility make space available on the roof of its corporate offices for the installation of a telecommunications carrier's transmission tower, although access of this nature might be mandated pursuant to a request for interconnection or for access to unbundled network elements under Section 251(c)(6).[179] WinStar petitioned for clarification or reconsideration of this holding, requesting a ruling that a LEC must allow telecommunications carriers access pursuant to Section 224 to rooftop facilities and related riser conduits that the LEC owns or controls.[180]

75. Based on the record compiled in response to the WinStar Petition, we tentatively concluded in the *Competitive Networks NPRM* that Section 224 includes a right of access to conduits, ducts, and

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[174] 1996 Conference Report at 113.

[175] *Local Competition First Report and Order*, 11 FCC Rcd at 16058-59, ¶¶ 1119-1122. We subsequently promulgated rate formulas to govern telecommunications service providers' access to pole attachments after February 8, 2001. *See Telecommunications Pole Attachments Pricing Report and Order*, 13 FCC Rcd at 6777.

[176] *Local Competition First Report and Order*, 11 FCC Rcd at 16082, ¶ 1179.

[177] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *Order on Reconsideration*, 14 FCC Rcd 18049 at 18067, ¶ 51. (*Local Competition Pole Attachments Reconsideration Order*).

[178] *Id.* at 18063, ¶ 38.

[179] *Local Competition First Report and Order*, 11 FCC Rcd at 16084-85, ¶ 1185.

[180] WinStar Communications, Inc. Petition for Clarification or Reconsideration (filed Sept. 30, 1996) (WinStar Petition). Relevant oppositions and comments were filed by American Electric Power Service Corporation et al. (AEPSC et al.), Ameritech, Duquesne Light Company (Duquesne), Edison Electric Institute and UTC, Sprint Corporation (Sprint), and United States Telephone Association. Replies were filed by AEPSC et al., Duquesne, and WinStar. *See also* WinStar Communications, Inc. Opposition to Petitions for Reconsideration at 5-10 (filed Oct. 31, 1996) (replying to Duquesne Opposition).

rights-of-way in MTEs.[181] We therefore proposed in the *NPRM* that, under Section 224, utilities must permit access to rooftops, conduits, and similar rights-of-way that they "own or control" in MTEs, and we requested comment on issues relating to the implementation of this requirement, including the circumstances under which utility ownership or control might be found to exist.[182] At the same time, we tentatively reaffirmed our conclusion that Section 224 does not confer a general right of access to utility property,[183] but we tentatively concluded that Section 224 does confer a right of access where a utility uses property that it owns in the manner of a right-of-way as part of its distribution network.[184]

2. Discussion

76. Based on the record before us and our analysis of the statute, we conclude that the Section 224(f)(1) right of access to poles, ducts, conduits, and rights-of-way that a utility owns or controls is not limited by location or by how the utility's ownership or control was granted. Thus, to the extent a utility owns or controls poles, ducts, conduits, or rights-of-way within an MTE, the utility may not exercise its control in a manner inconsistent with Section 224 to impede competitive access. At the same time, we note that Section 224 applies only to utilities, and was not intended to override whatever authority or control an MTE owner might otherwise retain under the terms of its agreements and state law. We interpret the term "rights-of-way" in the context of buildings to include, at a minimum, defined areas such as ducts or conduits that are being used or have been specifically identified for use as part of the utility's transportation and distribution network.[185] We also clarify that a utility's ability voluntarily to provide access to an area and obtain compensation for doing so is a prerequisite to utility ownership or control under Section 224. Finally, we address several issues relating to the implementation of Section 224, including a determination that states do not have to recertify their regulation of pole attachments rates in response to today's decision. Based on these conclusions, we grant the WinStar Petition for Reconsideration of the *Local Competition First Report and Order* to the extent discussed herein, and we otherwise deny that petition.

a. Scope of areas covered.

77. Initially, we note that access to on-premises conduits and similar rights-of-way is important to the development of telecommunications competition in MTEs. The record compiled in response to the *Competitive Networks NPRM* indicates that competitive LECs often need access to in-building ducts, conduits, and rights-of-way used by incumbent LECs and other utilities in order to expand their networks to serve the building.[186] To the extent that a new entrant is unable or does not desire to use the existing in-building wiring, it must obtain access to building conduit in order to install its own cables and wires. Moreover, even if a competitive LEC utilizes existing wiring for some of its in-building distribution, it may need access to conduits and rights-of-way in order to reach that wiring. For example, a provider

[181] *Competitive Networks NPRM*, 14 FCC Rcd at 12693-98, ¶¶ 39-48.

[182] *Id.* at 12687, ¶ 28.

[183] *Id.* at 12694, ¶ 40.

[184] *Id.* at 12695, ¶ 43.

[185] In the Further Notice of Proposed Rulemaking, we seek additional comment regarding the definition of rights-of-way in the context of MTEs. *See* Section V. D, *infra.*

[186] AT&T Comments at 10; Nextlink Comments at 3-4; Teligent Comments at 7-8; WinStar Comments at 7-9.

using wireless technology, in addition to needing a rooftop or similar location to place its antenna, must have access to conduit in order to connect its antenna to the building system.

78. To the extent that poles, ducts, conduits, and rights-of-way in MTEs are controlled by incumbent LECs, the incumbent LECs would have an incentive in the absence of regulation to deny access to their competitors. Section 251(c) of the Act requires incumbent LECs to grant other carriers access to their facilities under just, reasonable, and nondiscriminatory rates, terms, and conditions under many circumstances.[187] Nothing in Section 251(c), however, appears to address the situation where a building owner has granted a carrier access in order to serve customers in that building, but an incumbent LEC or other utility refuses to allow its competitor reasonable and nondiscriminatory access to conduits or similar pathways that the utility owns or controls. An incumbent LEC's power to deny competitors access to in-building conduits thus could impose a serious impediment to telecommunications choices for affected MTE residents. Our consideration of the effect of Section 224 within MTEs is intended to address this situation.

79. In the *Competitive Networks NPRM*, we tentatively concluded that the plain meaning of Section 224(f)(1) includes a right of access to ducts, conduits, and rights-of-way owned or controlled by a utility that are located in MTEs. In particular, we tentatively concluded that the definition of "right-of-way" as including a publicly or privately granted right to place telecommunications distribution facilities on public or private premises is consistent with the common usage of the term, and we sought comment on this analysis.[188] We also tentatively concluded more specifically that in-building conduit, such as riser conduit, used by a utility and owned or controlled by that utility falls within the scope of Section 224(f)(1) as either "conduit" or a "right-of-way."[189] Competitive LECs generally agree with these tentative conclusions.[190] They state that by not qualifying the terms "right-of-way" or "conduit" in the statute, Congress intended to give a broad scope to the terms such that they encompass rights of access to conduits on private property as well as public rights-of-way.[191] Incumbent LECs and premises owners generally disagree with our tentative conclusions and argue for a narrow interpretation of "right-of-way."192 For example, Bell Atlantic argues that Section 224 was intended to provide cable companies access to structures in public rights-of-way, rather than structures on private property, and therefore does not apply within buildings.[193] Cincinnati Bell contends that the legislative history of Section 224 suggests that the intended meaning of "conduit" is "underground reinforced passages."[194] Real Access Alliance argues that rights-of-way do not exist inside buildings, but rather that building access rights take the form of leases, licenses, and easements.[195]

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[187] *See* 47 U.S.C. §§ 251(c)(2) (interconnection), 251(c)(3) (unbundled access), and 251(c)(6) (collocation).

[188] *Competitive Networks NPRM*, 14 FCC Rcd at 12695, ¶ 42.

[189] *Id.* at 12696, ¶ 44.

[190] AT&T Comments at 14; Teligent Comments at 27-28; WinStar Comments at 54.

[191] AT&T Comments at 15; Teligent Comments at 14; WinStar Comments at 45.

[192] *See, e.g.*, GTE Comments at 25; United States Telephone Association Comments at 10.

[193] Bell Atlantic Comments at 7.

[194] Cincinnati Bell Comments at 4.

[195] Real Access Alliance Comments at 49.

80. We conclude that the obligations of utilities under Section 224 encompass in-building facilities, such as riser conduits, that are owned or controlled by a utility.[196] This interpretation is consistent with the plain meaning of Section 224(f)(1), which requires "non-discriminatory access to *any* pole, duct, conduit, or right-of-way owned or controlled"[197] by a utility, without qualification. Our interpretation of Section 224 is also consistent with industry practice, in which the terms duct and conduit are used to refer to a variety of enclosed tubes and pathways, regardless of whether they are located underground or aboveground. Indeed, as AT&T points out, the commonly used term "riser conduit" itself demonstrates that conduit is not generally understood to refer only to underground facilities.[198] Moreover, we recently amended Section 1.1402(i) of our Rules in another proceeding to clarify that "conduits" are not limited to underground facilities.[199]

81. In the *Competitive Networks NPRM,* we noted that the 1977 Pole Attachments Act Senate Report described duct or conduit systems as consisting of underground facilities.[200] We conclude that this legislative history does not circumscribe our authority to apply Section 224 to in-building ducts, conduits, or rights-of-way. The text of the statute, as well as the legislative history relating to its amendment in 1996, in no way limits the terms duct or conduit to underground facilities.[201] Moreover, even where there may be "contrary indications in the statute's legislative history," we are not required to

[196] AT&T Comments at 18; WinStar Comments at 60. The United States Court of Appeals for the Eleventh Circuit recently held that the Commission lacks authority under Section 224(f)(1) over pole attachments for wireless communications. *Gulf Power II*, 208 F.3d at 1263, *petition for reh'g denied*, 2000 WL 1335040 (11th Cir. Sept. 12, 2000). *Gulf Power II* disposed of consolidated petitions for review of the Commission's *Telecommunications Pole Attachments Pricing Report and Order,* 13 FCC Rcd 6777, implementing 47 U.S.C. § 224, as amended by the 1996 Act. We note that the court has stayed issuance of the mandate in *Gulf Power II* pending the ultimate disposition of any petition for certiorari. Moreover, although some language in *Gulf Power II* could be read to suggest that the scope of Section 224 turns on the identity of the carrier, and thus that even a wireline facility is not covered by Section 224 when used by a "wireless" carrier, we do not believe the decision must necessarily be read in this manner. To the contrary, it is possible that the decision is most reasonably construed to turn in whole or in part on the nature of the particular equipment for which attachments is sought, and thus not to exclude, for example, any telecommunications carrier's wireline facilities within MTEs from the scope of Section 224.

[197] 47 U.S.C. § 224(f)(1) (emphasis added).

[198] AT&T Comments at 19.

[199] *See Cable Pole Attachments Pricing Report and Order,* 15 FCC Rcd at 6523, App. A (amending definition of "conduit" to refer to "a structure . . . usually placed in the ground," rather than "a pipe placed in the ground"); *see also* Petition by MCI for Arbitration of Certain Terms and Conditions of a Proposed Agreement with GTE South Incorporated Concerning Interconnection and Resale Under the Telecommunications Act of 1996, Case No. 96-440, *Order* (Ky. P.S.C. Dec. 23, 1996) (holding that incumbent LEC has duty under Section 251(b)(4) of the Act to afford access to rights-of-way in private office buildings).

[200] *See Competitive Networks NPRM,* 14 FCC Rcd at 12696, ¶ 44 & n.98 (citing 1977 Pole Attachments Act Senate Report at 26).

[201] *See* H.R. Rep. No. 104-204, 104th Cong., 1st Sess. at 91-92 (1995); H.R. Rep. No. 104-458, 104th Cong., 2nd Sess. at 205-207 (1996).

"resort to legislative history to cloud a statutory text that is clear."[202] This is especially true where, as here, the statute is unambiguous on its face.

82. We also conclude that "rights-of-way" in buildings means, at a minimum, defined pathways that are being used or have been specifically identified for use as part of a utility's transmission and distribution network. The Real Access Alliance argues that there are no "rights-of-way" in buildings, but that utilities' building access rights take the form of leases, licenses, and easements.[203] We note, however, that the term "right-of-way" can have a variety of meanings, including, for example, the equivalent of an easement.[204] As commenters point out, the arrangements under which utilities have obtained and retain access to buildings, as well as the nomenclature used to describe those arrangements and the attendant rights and responsibilities, vary from building to building and from state to state.[205] We believe, consistent with Congressional intent to ensure that utilities do not exercise their control over structures and areas to which providers seek access in a manner that impedes telecommunications competition or cable service, that a "right-of-way" should be read to include, at a minimum, any defined pathway in an MTE that a utility is actually using or has specifically identified for its future use, regardless of how its right of access is denominated by the parties or under state law. We do not believe that state concerns with definitions of property interests, including public rights-of-way, will be harmed or affected by the nomenclature we use here solely with reference to Section 224. We therefore conclude that the nature of a right of access, and not the nomenclature applied, governs for these purposes. Consistent with Congressional intent to ensure that utilities do not exercise their control over structures and areas to which providers seek access in a manner that impedes telecommunications competition or cable service, we conclude that a right-of-way exists within the meaning of Section 224, at a minimum, where (1) a pathway is actually used or has been specifically designated for use by a utility as part of its transmission and distribution network and (2) the boundaries of that pathway are clearly defined, either by written specification or by an unambiguous physical demarcation.[206] In the Further Notice of Proposed Rulemaking, we request comment on other situations in which an in-building right-of-way may be established.[207]

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[202] *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994). *See also Burlington N. R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) (when language of statute is unambiguous, review of legislative history is unnecessary).

[203] Real Access Alliance Comments at 49.

[204] *See, e.g., Great Northern Ry. Co. v. United States*, 315 U.S. 262, 276-79 (1942) (construing rights-of-way granted by the 1875 Right-of-way Act to constitute easements); *Joy v. City of Saint Louis*, 138 U.S. 1, 44 (1890) (*Joy*); *Board of County Supervisors of Prince William County v. United States*, 48 F.3d 520, 527 (Fed. Cir.) ("'Rights-of-way' are another term for easements"), *cert. denied*, 516 U.S. 812 (1995).

[205] Teligent Comments at 26-27; Real Access Alliance Reply Comments at 25-26.

[206] For example, a broadly worded easement permitting a utility to place facilities throughout a building or "in hallways" would not in itself create a right-of-way under this definition. A utility's placement of facilities in a defined pathway pursuant to such an easement would, however, create a right-of-way along that pathway, thus giving telecommunications carriers and cable service providers a right of access if the right-of-way is owned or controlled by the utility.

[207] We note, however, that a utility must take all reasonable steps to expand capacity to accommodate requests for attachments just as it would expand capacity to meet its own needs. *See Local Competition Pole Attachments Reconsideration Order*, 14 FCC Rcd at 18067, ¶ 51.

83. We further conclude that a "right-of-way" under Section 224 includes property owned by a utility that the utility uses in the manner of a right-of-way as part of its transmission or distribution network. We tentatively concluded in the *Competitive Networks NPRM* that Section 224 does not encompass a general right of access to utility property.[208] No party has advanced any arguments against this proposition, and we therefore reaffirm our earlier conclusion on this record. Thus, for example, the roof of a utility's corporate office is not, in and of itself, subject to access under Section 224. We also tentatively concluded, however, that "Section 224 encompasses a utility's obligation to provide cable television systems and telecommunications service providers with access to property that it owns which it uses as part of its distribution network."[209] GTE argues that the traditional definition of right-of-way and the underlying purpose of Section 224 require that property owned by a utility in fee simple absolute can never be subject to Section 224.[210] We disagree, and find that our tentative conclusion is consistent with both the language and purpose of Section 224.[211] We believe our tentative conclusion is consistent with the use of the term "right-of-way" to denote not only the right to pass over the land of another, but also the land itself.[212] We also believe this definition is consistent with the inclusion in Section 224 of rights-of-way that a utility "owns" as well as "controls." We agree with AT&T that the test for determining when a utility is using its own property in a manner equivalent to a right-of-way should "be broad enough to encompass the wide range of activities that constitute use of property in a manner equivalent to a right-of-way."[213] Thus, where a utility uses its own property in connection with its transmission or distribution network in a manner that would trigger the obligations of Section 224 if it had obtained a right-of-way from a private landowner, we conclude that it should be considered to own or control a right-of-way within the meaning of Section 224.

84. The National League of Cities has expressed concern that application of Section 224 within buildings may preempt implementation or enforcement of state safety-related codes.[214] We emphasize

[208] *Competitive Networks NPRM*, 14 FCC Rcd at 12694, ¶ 40; *see also Local Competition First Report and Order*, 11 FCC Rcd at 16084-85, ¶ 1185 (stating that Congressional intent in promulgating Section 224(f) "was to permit cable operators and telecommunications carriers to "piggyback" along distribution networks owned or controlled by utilities, as opposed to granting access to every piece of equipment or real property owned or controlled by the utility.").

[209] *Competitive Networks NPRM*, 14 FCC Rcd at 12695, ¶ 43.

[210] GTE Comments at 25.

[211] *See* AT&T Comments at 17; WinStar Comments at 56.

[212] *See Joy v. City of Saint Louis*, 138 U.S. at 44; Black's Law Dictionary 1326 (6th ed. 1990). We note that, in interpreting Section 224(f), an arbitration panel of the Michigan Public Service Commission has held that land used for distribution facilities would be considered a "right-of-way" even if it were held by the utility in fee simple absolute. AT&T Communications of Michigan, Inc., Case No. U-11151, *Decision of Arbitration Panel* at 50-52 (Mich. P.S.C. Oct. 28, 1996); *see also* AT&T Communications of Ohio, Inc.'s Petition for Arbitration of Inter-Connection Rates, Terms and Conditions and Related Arrangements with Ohio Bell Telephone Company d.b.a. Ameritech Ohio, Case No. 96-752-TP-ARB, *Arbitration Panel Report* at 52-53.

[213] AT&T Comments at 17.

[214] *See* Petition for Environmental Impact Statement filed by the National League of Cities, the National Association of Counties, the Michigan Municipal League, and the Texas Coalition of Cities for Utility Issues, at 21-24 (August 16, 2000) (National League of Cities, et al. Petition for EIS). We address petitioners' concern regarding the extension of the OTARD rules in paras. 121-123 *infra*. To the extent that the EIS petition expresses concern regarding issues raised in the Notice of Inquiry portion of the *Competitive Networks NPRM*, those issues will be addressed separately at another time. *See* note 2, *supra*.

that our actions taken today are not intended to preempt, or impede, in any way the implementation or enforcement of state safety-related codes. We also note that under Section 224(f)(2) utilities may impose conditions on access to transmission facilities, if necessary for reasons of safety or reliability.[215]

b. Ownership or control.

85. In order for a right of access to be triggered under Section 224, the property to which access is sought not only must be a utility pole, duct, conduit, or right-of-way, but it must be "owned or controlled" by the utility.[216] In this regard, we have previously held that "[t]he scope of a utility's ownership or control of an easement or right-of-way is a matter of state law."[217] Specifically, "the access obligations of Section 224(f) apply when, as a matter of state law, the utility owns or controls the right-of-way to the extent necessary to permit such access."[218] In the *NPRM*, we asked whether we should federally define the circumstances under which utility ownership or control exists, or whether we should continue to defer to the rights created under state law.[219] Ameritech believes that the Commission should refrain from interpreting when utility ownership or control exists and continue to defer to state law.[220] The Real Access Alliance argues that the Commission must continue to defer to state law because any attempt to alter the property rights of either utilities or property owners would amount to an unconstitutional taking in violation of the Fifth Amendment.[221] AT&T argues that Commission guidance is necessary in determining the existence and scope of ownership or control in particular circumstances, such as where a utility has secured building access rights through a private agreement with a property owner.[222] WinStar argues that federal law should govern in this matter in order to ensure a national policy for access to rights-of-way.[223] WinStar states that it has suffered in states that have not taken action to promote building access, often because building owners with a national presence penalize carriers in states without building access laws for access gained in states that have such laws.[224]

86. In the *Local Competition First Report and Order*, we considered arguments that certain private consent agreements, when interpreted under the applicable state property laws, deprive the utilities of the ownership or control that triggers their obligation to accommodate a request for access.[225] Some commenters in that proceeding argued that under such circumstances, Section 224 does not provide

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[215] 47 U.S.C. § 224(f)(2).

[216] 47 U.S.C. § 224(a)(4).

[217] *Local Competition First Report and Order*, 11 FCC Rcd at 16082, ¶ 1179.

[218] *Id.*

[219] *Competitive Networks NPRM*, 14 FCC Rcd at 12696-97, ¶¶ 45-47.

[220] Ameritech Comments at 4.

[221] Real Access Alliance Comments at 55.

[222] AT&T Comments at 19-20.

[223] WinStar Comments at 62.

[224] *Id.*

[225] *Local Competition First Report and Order,* 11 FCC Rcd at 16081-82, ¶ 1178.

a right of access.[226] Other commenters argued that the statute does not draw distinctions between situations where a private consent agreement exists and situations where one does not exist, and thus provides access regardless of the terms of an agreement or state law.[227] We concluded that the scope of utility ownership or control is a matter of state law. Thus, obligations apply when, as a matter of state law, the utility owns or controls the right-of-way to the extent necessary to permit such access.

87. We conclude that our analysis in the *Local Competition First Report and Order* remains valid, and applies to ducts, conduits, and rights-of-way in buildings as well as to those in other locations. We therefore reject arguments that we should define utility access to a building as in itself establishing utility control over conduits or rights-of-way or establish presumptions in this regard. We emphasize that the right of access granted under Section 224 lies only against utilities, and that Section 224 is not intended to override whatever authority or control MTE owners may otherwise retain under state law.[228] We therefore conclude that, consistent with the purposes of Section 224, utility ownership or control of rights-of-way and other covered facilities exists only if the utility could voluntarily provide access to a third party and would be entitled to compensation for doing so. As the Real Access Alliance points out, the forms of access arrangements between utilities and building owners, and the resulting rights and responsibilities of each party, can vary greatly depending on the means by which access was originally achieved and on state law.[229] Thus, state law determines whether, and the extent to which, utility ownership or control of a right-of-way exists in any factual situation within the meaning of Section 224.

88. We note that existing utility rights-of-way in MTEs, whether created by force of law, by written agreement between the parties, or by tacit consent, generally originated in an era of monopoly utility service. Thus, the purpose behind these rights of access was to ensure that end users could receive service from the single entity capable of providing, or legally authorized to provide, such service. The parties that established the terms of these rights of access would rarely, if ever, have considered the effect their actions might have on hypothetical future competition. Section 224 addresses the ability of utilities to act anticompetitively with respect to telecommunications competitors as a result of these developments. Our concerns about anticompetitive exclusion by building owners are addressed elsewhere in this item.

89. This approach avoids any constitutional concerns that may arise under the Fifth Amendment. Because we interpret Section 224 to apply only against utilities, there is no taking from premises owners. The only taking under Section 224 is from utilities, who are deprived of the power to exclude others from conduits or rights-of-way to the extent of their ownership or control. This taking, however, is compensated under statute and our rules, and thus is fully consistent with constitutional requirements.[230]

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[226] *Id.*

[227] *Id.*

[228] We note, however, that nothing in Section 224 prevents a state from extending the principles of Section 224 under state law to entities other than those considered to be "utilities," as that term is defined in the federal statute. For example, Massachusetts recently promulgated building access regulations which include a premises owner within the definition of "utility." *Massachusetts Nondiscriminatory Access Order.*

[229] Real Access Alliance Comments at 53-55. We further note that the parties' respective rights and responsibilities may typically be different over rights-of-way located outside buildings than inside buildings. For example, rights-of-way over land are typically used to provide service to the general public, whereas rights-of-way in MTEs ordinarily are used only to provide service to tenants in the MTE.

[230] *See Gulf Power I,* 187 F.3d at 1324.

We note that the extent of a utility's ownership or control of a duct, conduit, or right-of way under state law must be resolved prior to a complaint being filed with the Commission regarding whether the rates, terms or conditions of access are reasonable.

90. This approach also will not affect the operation of our rules governing the disposition of cable inside wiring. Section 76.804(a) of our rules sets forth the procedures for disposition of "home run wiring" owned by a multichannel video programming distributor (MVPD) in a multiple dwelling unit (MDU) when the MVPD "does not . . . have a legally enforceable right to remain on the premises against the wishes of the MDU owner."[231] As explained above, Section 224 grants a right of access only to the extent a utility owns or controls poles, ducts, conduits, or rights-of-way. It does not grant a legally enforceable right to remain on the premises against the wishes of the MDU owner. Therefore, it does not interfere with the disposition of cable home run wiring under our rules.

c. Implementation issues.

91. Section 224 not only requires utilities to provide nondiscriminatory access to poles, ducts, conduits, and rights-of-way, but mandates that they do so at rates, terms and conditions that are just and reasonable.[232] Section 224 further specifies principles for determining whether a rate is just and reasonable in the context both of cable providers' and telecommunications carriers' attachments, all of which are based on the utility's costs in connection with the pole, duct, conduit, or right-of-way.[233] In order to implement these provisions, we have promulgated formulas to determine just and reasonable rates for access to poles, ducts, and conduits.[234] These formulas do not appear to be directly transferable to the inside the building context and the parties to this proceeding have not suggested how they might be adjusted for use here. Therefore, to the extent the existing formulas do not apply, we will determine reasonable and just compensation consistent with the statute and Fifth Amendment on a case-by-case basis.[235] We will consider initiating a rulemaking proceeding to establish rate formulas for in-building attachments in the future if it proves necessary or efficient to do so. We anticipate, however, that in most instances the existing rules will encourage the parties to agree to reasonable rates through negotiation.

92. Section 224 further provides that the Commission has no jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way for pole attachments in instances where a state has certified to the Commission that it regulates such matters.[236] Consistent with the statute, 19 states have made such certification to the Commission. In those states that do not regulate such matters, we will continue to apply the formula presumptions outlined in the *Telecommunications*

[231] 47 C.F.R. § 76.804(a).

[232] 47 U.S.C. § 224(b)(1).

[233] 47 U.S.C. § 224(d),(e).

[234] *Telecommunications Pole Attachments Pricing Report and Order*, 13 FCC Rcd at 6777; *Cable Pole Attachments Pricing Report and Order*, 15 FCC Rcd at 6453.

[235] *Cf. Telecommunications Pole Attachments Pricing Report and Order*, 13 FCC Rcd at 6832, ¶ 121 (holding that the record did not permit us to establish detailed standards for the pricing of access to rights-of-way, and accordingly that we would consider allegations of unjust, unreasonable, or discriminatory rates on a case-by-case basis).

[236] 47 U.S.C. § 224(c).

Pole Attachments Pricing Report and Order and the *Cable Pole Attachments Pricing Report and Order.*[237]

93. Several commenters argue that we should require states to recertify that they are regulating pole attachments within buildings, and that we should look behind state certifications to ensure that they are in fact regulating consistent with Section 224.[238] Consistent with our past practice in similar circumstances, we decline to do so. Rather, we will continue to apply our existing regime of presumptions and burden of proof regarding certification. We emphasize, moreover, that federal regulation of access, rates, terms, or conditions for pole attachments is preempted only to the extent a state is actually regulating attachments. Should a state fail to resolve a complaint within specified time limits, the Commission's rules provide that we assume jurisdiction over the complaint.[239]

E. Areas Under Tenant Control

1. Background

94. Section 1.4000 of our rules prohibits, with limited exceptions, any state or local law or regulation, private covenant, contract provision, lease provision, homeowners' association rule, or similar restriction that impairs the installation, maintenance, or use of certain antennas designed to receive video programming services on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership or leasehold interest in the property.[240] We adopted Section 1.4000 pursuant to Section 303 of the Communications Act as directed by Section 207 of the 1996 Act, which applies to the placement of over-the-air reception devices (OTARDs) in order to receive television broadcast signals, direct broadcast satellite services, and multichannel multipoint distribution services.[241] In May, 1999, the Wireless Communications Association International, Inc. (WCA) filed a Petition for Rulemaking asking us to extend the principles embodied in Section 1.4000 to the placement of antennas used for any fixed wireless service.[242] In the *Competitive Networks NPRM*, we requested comment on

[237] *Telecommunications Pole Attachments Pricing Report and Order,* 13 FCC Rcd at 6777; *Cable Pole Attachments Pricing Report and Order*, 15 FCC Rcd at 6453.

[238] AT&T Comments at 21-22; Teligent Comments at 38; WinStar Comments at 65.

[239] *See* 47 C.F.R. § 1.1414(e). We note that if it is shown in a complaint proceeding that a state does not regulate access to ducts or conduits within buildings, for example, that state's regulation of pole attachments on public rights-of-way, and its certification to such regulation, would not defeat the Commission's jurisdiction over access to ducts or conduits within buildings. In such a case, we would decide the complaint regarding in-building attachments, while continuing to respect the state's authority over those pole attachments that it does regulate.

[240] 47 C.F.R. § 1.4000.

[241] *See* Preemption of Local Zoning Regulation of Satellite Earth Stations, *Report and Order, Memorandum Opinion and Order in IB Docket No. 95-59*, and Implementation of Section 207 of the Telecommunications Act of 1996 and Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service, *Further Notice of Proposed Rulemaking in CS Docket No. 96-83*, 11 FCC Rcd 19276 (1996) (*OTARD First Report and Order*). Section 207 of the 1996 Act states that "[w]ithin 180 days after the date of enactment of this Act, the Commission shall, pursuant to Section 303 of the Communications Act of 1934, promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services." 47 U.S.C. § 303 note (1996 Act, Section 207).

[242] Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas (continued....)

whether we should adopt rules similar to those adopted in the video context that would protect the ability to place similar antennas to transmit and receive telecommunications signals and other fixed wireless signals that are not covered by Section 207.[243]

95. As currently constituted, Section 1.4000 prohibits restrictions that impair the installation, maintenance or use of: (1) any antenna designed to receive direct broadcast satellite service, including direct-to-home satellite services, that is one meter or less in diameter or is located in Alaska; (2) any antenna designed to receive video programming services via multipoint distribution services, including multichannel multipoint distribution services, instructional television fixed services, and local multipoint distribution services, and that is one meter or less in diameter; (3) any antenna designed to receive television broadcast signals; or (4) any mast supporting an antenna receiving any video programming described in the Section. For the purposes of Section 1.4000, a law, regulation, or restriction impairs installation, maintenance, or use of an antenna if it: unreasonably delays or prevents installation, maintenance, or use; unreasonably increases the cost of installation, maintenance, or use; or precludes reception of an acceptable quality signal. Section 1.4000 also sets forth principles governing fees or costs that may be imposed for placement of covered antennas and enforcement of covered regulations. Restrictions that would otherwise be forbidden are permitted if they are necessary for certain safety or historic preservation purposes, are no more burdensome than necessary to achieve their purpose, and meet certain other conditions set forth in the rule. Finally, Section 1.4000 includes provisions for waiver and declaratory ruling proceedings.

96. Many parties support an extension of the principles of the OTARD rules to include all fixed wireless devices.[244] For example, PCIA contends that extending the antenna exemption rule to include all fixed wireless devices is essential to the Commission meeting its obligation to promote the deployment of advanced telecommunications capability under Section 706(a) of the 1996 Act.[245] On the other hand, Real Access Alliance argues that, in extending the OTARD rules to leased property, the Commission has already exceeded its authority and violated the Fifth Amendment. Real Access Alliance contends that further extending the rules to include new services such as telecommunications services would compound the violation.[246] Real Access Alliance argues that the statutory language of Section 207 "refers explicitly to video programming, and to three types of antennas used primarily (and at the time of the enactment of the law, solely) to deliver video services."[247] Real Access Alliance concludes that the statutory language is very clear and cannot possibly be construed to permit the Commission to go any further than it already has, under any circumstances.[248]

(Continued from previous page)
Designed to Provide Fixed Wireless Service (filed May 26, 1999); *see also* Letter from Paul J. Sinderbrand, Counsel for Wireless Communications Association International, Inc., to Magalie Roman Salas, Secretary, FCC, dated September 7, 2000 (asserting that timely deployment of Sprint and WorldCom fixed wireless broadband services is being thwarted by homeowner associations' antenna restrictions).

[243] *Competitive Networks NPRM*, 14 FCC Rcd at 12710-12712, ¶ 69.

[244] *See* AT&T Comments at vi; Fixed Wireless Communications Coalition Comments at 14-15; PCIA Comments at 34-35; Teligent Comments at 46. *Cf.* Real Access Alliance Comments at vii.

[245] PCIA Comments at 34-35. *See* 47 U.S.C. § 157(a) note.

[246] Real Access Alliance Comments at vii.

[247] *Id.* at 72.

[248] *Id.* at 72-73.

2. Discussion

a. Extension of OTARD Rules

97. We conclude that we should extend the OTARD rules by amending Section 1.4000 to include customer-end antennas used for transmitting or receiving fixed wireless signals, as well as multichannel video programming signals that are currently covered by the rules.[249] For the purpose of the OTARD rules, "fixed wireless signals" are any commercial non-broadcast[250] communications signals transmitted via wireless technology to and/or from a fixed customer location.[251] As discussed above, Congress intended in the 1996 Act to promote telecommunications competition and the deployment of advanced telecommunications capability.[252] Indeed, Congress included several provisions to limit restrictions on the deployment of facilities used for these purposes.[253] To the extent a restriction unreasonably limits a customer's ability to place antennas to receive telecommunications or other services, whether imposed by government, homeowner associations, building owners, or other third parties, that restriction impedes the development of advanced, competitive services. In the *OTARD First Report and Order*,[254] the Commission determined that restrictions on the placement of antennas one meter in diameter or smaller unreasonably limit a video programming customer while restrictions on larger C-band reception antennas might be reasonable. We find that the same types of restrictions on the same types of antennas unreasonably restrict deployment regardless of the services provided.

98. Moreover, distinguishing in the protection afforded based on the services provided through an antenna produces irrational results. Precisely the same antennas may be used for video services, telecommunications, and internet access. Indeed, sometimes a single company offers different packages of services using the same type of antennas. Under our current rules, a customer ordering a telecommunications/video package would enjoy protection that a customer ordering a telecommunications-only package from the same company using the same antenna would not. Thus, we conclude that the current rules potentially distort markets by creating incentives to include video programming service in many service offerings even if it is not efficient or desired by the consumer.

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[249] The text of Section 1.4000, as amended by this Order, appears in Appendix B.

[250] Although the definition of "fixed wireless signals" does not apply to broadcast signals, we note that television broadcast signals continue to be covered under our OTARD rules.

[251] This definition of "fixed wireless signals" does not include, among other things, AM radio, FM radio, amateur ("HAM") radio, Citizen's Band (CB) radio, and Digital Audio Radio Service (DARS) signals. We note that State and local regulation of the placement of antennas used for HAM radio is covered by Section 97.15(b) of the Commission's rules, 47 C.F.R. § 97.15(b).

[252] *See, e.g.*, 47 U.S.C. § 251 (each telecommunications carrier has the duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers to promote the development of competitive markets); 47 U.S.C. § 157 nt (1996 Act, Section 706) (Commission shall encourage the deployment of high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology).

[253] *See, e.g.*, 47 U.S.C. § 253 (removal of barriers to entry); 47 U.S.C. § 332(c)(7) (local zoning authority shall not prohibit the provision of personal wireless service); 47 U.S.C. § 303 nt (1996 Act, Section 207) (Commission shall promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services).

[254] *OTARD First Report and Order*, 11 FCC Rcd at 19279, ¶ 5.

99. In extending the OTARD rules to encompass fixed wireless devices, we mean to include all customer-end antennas and supporting structures of the physical type currently covered by the rule, regardless of the nature of the services provided through the antenna (*i.e.*, voice, data, or video). Similarly, the amended rules apply both to satellite and terrestrial services. In addition, the rules apply to antennas that transmit and receive signals, only transmit signals, or only receive signals.[255] We make clear, however, that the protection of Section 1.4000 applies only to antennas at the customer end of a wireless transmission, *i.e.*, to antennas placed at a customer location for the purpose of providing fixed wireless service (including satellite service) to one or more customers at that location. We do not intend these rules to cover hub or relay antennas used to transmit signals to and/or receive signals from multiple customer locations.[256]

100. We emphasize that the restrictions we adopt today are limited by the expressed limitations of Section 1.4000.[257] Thus, our extension of the OTARD rules applies only to areas within the exclusive use or control of the antenna user and in which the antenna user has a direct or indirect ownership or leasehold interest. Similarly, the extension of the rules applies only to antennas one meter or less in diameter or diagonal measurement, or larger antennas located in Alaska used to receive satellite service, and to masts used to support such antennas.[258] In addition, the exceptions permitting certain restrictions for safety and historic preservation purposes continue to apply.[259]

b. Legal Authority

101. One of the principal goals of the 1996 Act was "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[260] As noted above, these objectives are effectively hindered by restricting OTARD protections to devices that receive

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[255] Special provisions to protect the public from excessive exposure to radio frequency emissions are discussed at paras. 118-121, *infra*. We note that our existing rule already covers transmission devices that work in tandem with the receiving device and are necessary to select programming on a covered receiving antenna. Implementation of Section 207 of the Telecommunications Act of 1996 and Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service, *Order on Reconsideration*, 13 FCC Rcd 18962, 18988 at ¶ 59 (1998) (*OTARD Order on Reconsideration*).

[256] Regulations governing the placement of such antennas may, however, be affected by other provisions of the Communications Act or our rules. *See, e.g.*, 47 U.S.C. § 332(c)(7); 47 C.F.R. § 25.104.

[257] *See* text of Section 1.4000 in Appendix B.

[258] This revision to the OTARD rules does not change the Commission's conclusion in the previous OTARD proceedings that masts that extend more than 12 feet above the roof of the building or that are taller than the distance between the antenna and the lot line may require a safety permit. *See OTARD Order on Reconsideration*, 13 FCC Rcd at 18979-80, ¶¶ 34-36. This recognition of a possible safety hazard due to the height of the mast may apply, as well, to the non-video antennas now covered by the OTARD rules. We reiterate that permit requirements for masts exceeding this height may be imposed to achieve legitimate safety objectives, not for aesthetic purposes. We do not condone an outright prohibition of such masts unless the safety concerns cannot be addressed adequately. *See OTARD Order on Reconsideration*, 13 FCC Rcd at 18979-80, ¶ 36. Of course, masts should not be taller than necessary to receive an acceptable quality signal from the desired service.

[259] *See* 47 C.F.R. § 1.4000(b).

[260] Telecommunications Act of 1996, Pub. L. No. 104-04, purpose statement, 110 Stat. 56, 56 (1996) (*1996 Act Preamble*).

video programming services. Federal courts have long established that the Commission has the authority to promulgate regulations to effectuate the goals and accompanying provisions of the Act in the absence of explicit regulatory authority, if the regulations are reasonably ancillary to existing Commission statutory authority.[261] Thus, in light of our finding that the existing OTARD regulatory regime effectively hinders one of the principal goals of the 1996 Act, and because Commission action is reasonably ancillary to several explicit statutory provisions, we conclude that the Commission has the statutory authority to extend the OTARD protections to antennas used to transmit or receive fixed wireless signals. We also conclude that preemption of state and local regulation created by the extension of OTARD protections is justified in these circumstances. Finally, we find that Section 332(c)(7) of the Act, which addresses regulation of "personal wireless service facilities," does not apply to customer-end antennas.

102. Section 1 of the Act provides that the Commission was created "for the purpose of regulating interstate and foreign commerce in communications by wire and radio so as to make available, so far as possible, to all people of the United States, . . . a rapid, efficient, Nation-wide, and world-wide, wire and radio communications service with adequate facilities at reasonable charges[.] . . . "[262] Section 1 also directs the Commission to "execute and enforce the provisions of [the] Act."[263] In promulgating the extension of OTARD protections to antennas used for the transmission or reception of fixed wireless signals, the Commission is furthering the express objectives of Section 1 of the Act because, as noted above, we are facilitating efficient deployment of competitive communications services.

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[261] *See, e.g., AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (J. Scalia, writing for the majority, upholding Commission's exercise of ancillary jurisdiction pursuant to Section 201(b)); *United States v. Southwestern Cable,* 392 U.S. 157 (1968) (*Southwestern Cable*) (upholding the Commission's authority to regulate cable television); *National Broadcasting Comm'n v. United States*, 319 U.S. 190, 219 (1943) (Congress "did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency"); *Texas Rural Legal Aid, Inc. v. Legal Serv. Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991) (a "congressional prohibition of a particular conduct may actually support the view that the administrative entity can exercise its authority to eliminate a similar danger"); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1183 (D.C. Cir. 1989) (upholding Commission's authority to reinstate syndicated exclusivity rules for cable television companies as ancillary to the Commission's authority to regulate television broadcasting); *Rural Tel. Coalition v. FCC*, 838 F.2d 1307 (D.C. Cir. 1988) (upholding Commission's pre-statutory version of the universal service fund as ancillary to its responsibilities under Sections 1 and 4(i) of the Communications Act, stating that "[a]s the Universal Service Fund was proposed in order to further the objective of making communications service available to all Americans at reasonable charges, the proposal was within the Commission's statutory authority"); *North American Telecomm. Ass'n v. FCC*, 772 F.2d 1281, 1292-93 (7th Cir. 1985) ("Section 4(i) empowers the Commission to deal with the unforeseen – even if [] that means straying a little way beyond the apparent boundaries of the Act – to the extent necessary to regulate effectively those matters already within the boundaries") (citations omitted); *Lincoln Tel. & Tel. Co. v. FCC*, 659 F.2d 1092, 1109 (D.C. Cir. 1981) ("The instant case was an appropriate one for the Commission to exercise the residual authority contained in Section 154(i) to require a tariff filing. . . . The Commission properly perceived the need for close supervision and took the necessary course of action: it required LT&T to file an interstate tariff setting forth the charges and regulations for interconnection."); *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 731 (2d Cir. 1974) (holding that "even absent explicit reference in the statute, the expansive power of the Commission in the electronic communications field includes the jurisdictional authority to regulate carrier activities in an area as intimately related to the communications industry as that of computer services, where such activities may substantially affect the efficient provision of reasonably priced communications service").

[262] 47 U.S.C. § 151.

[263] *Id.*

103. Moreover, we believe that Section 706 of the 1996 Act, which addresses advanced telecommunications incentives, also supports our extension of the OTARD principles. Section 706 directs the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity . . . measures that promote competition in the local telecommunications market, and other regulating methods that remove barriers to infrastructure investment."[264] We believe that the extension of OTARD protections to antennas used for the transmission or reception of fixed wireless signals will foster the deployment of advanced telecommunications services.

104. Our action also is necessary to further the consumer protection purposes of Sections 201(b), 202(a), and 205(a) of the Act. These statutory provisions are intended to ensure that the rates, terms, and conditions for the provision of common carrier service are just, fair, and reasonable, and that there is no unjust or unreasonable discrimination in the provision of such service. [265] Further, Section 201(b) grants us express authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of th[e] Act."[266] To the extent devices used for multichannel video programming services are protected from unreasonable restrictions under the OTARD rules and the same devices when used only for fixed wireless services are not, consumers who want only fixed wireless service may inexorably be forced to pay unjust and unreasonable charges in connection with unwanted video programming. Thus, if we failed to extend the OTARD principles, we would effectively undermine the policies against unreasonable charges and discriminatory policies that are codified in Sections 201(b), 202(a), and 205(a).

105. Because our extension of the OTARD rules is necessary to realize these statutory goals, Sections 303(r) and 4(i) provide the basis for our exercise of ancillary jurisdiction. Section 303 prescribes the general powers of the Commission with respect to radio transmissions.[267] Specifically, it authorizes us to "[m]ake such rules . . . as may be necessary to carry out the provisions of this the Act."[268] Section 4(i) provides that "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."[269] Federal courts have consistently recognized that these provisions give the Commission

[264] 47 U.S.C. § 157 note.

[265] *See* 47 U.S.C. § 201(b) ("all charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful. . . ."); 47 U.S.C. § 202(a) ("[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communications service. . . ."); 47 U.S.C. § 205(a) ("the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or charges[,] . . . and what classification, regulation, or practice is or will be just, fair, and reasonable. . . .").

[266] *See* 47 U.S.C. § 201(b).

[267] 47 U.S.C. § 303; *see also* 47 U.S.C. § 301 ("It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of radio transmission[.]").

[268] 47 U.S.C. § 303(r).

[269] 47 U.S.C. § 154(i).

broad authority to take actions that are not specifically encompassed within any statutory provision but that are reasonably necessary to advance the purposes of the Act.[270]

106. Indeed, when Congress enacted Section 207, it recognized that Section 303 is a source of authority to promulgate regulations like the ones that we are adopting today. Section 207 directs the Commission to promulgate regulations prohibiting restrictions affecting devices used to receive the specified video programming services "pursuant to Section 303 of the Communications Act."[271] This statutory language reflects Congress' recognition that, pursuant to Section 303, the Commission has always possessed authority to promulgate rules addressing OTARDs. Section 207 *required* us to promulgate rules within 180 days after enactment, effectively removing our discretion on both the timing and the determination of the need for such regulation. Although Section 207 *directed* us to take action in the context of devices designed to receive the named services, nothing in Section 207 precludes us from exercising our power under Section 303 and other provisions to protect the placement of similar antennas that receive or transmit other signals. Indeed, to the extent our action today applies to state and local governments, we previously imposed similar limits on state and local regulation of the placement of antennas both before and subsequent to the 1996 Act.[272] We therefore conclude that the scope of the Section 207 directive to exercise our authority under Section 303 does not limit our independent exercise of the same authority under Section 303 and other provisions in a broader context and, in fact, affirmatively supports our use of Section 303 to extend the OTARD rules to fixed wireless devices.

107. As applied to restrictions imposed by state and local governments, our extension of the OTARD rules also falls well within the bounds of established preemption principles. The Commission may preempt state law when, among other reasons, it "stands as an obstacle to the accomplishment and execution of the full objectives of Congress."[273] Moreover, "[p]re-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation."[274] In addition, to the extent our regulation affects both interstate and intrastate services, preemption may be upheld "where it [is] not possible to separate the interstate and the intrastate components" of the regulation.[275] As discussed above, state or local regulations that unreasonably restrict a customer's ability to place antennas used for the transmission or reception of fixed wireless signals impede the full achievement of important federal objectives, including the promotion of telecommunications competition and customer choice and the ubiquitous deployment of advanced telecommunications capability. Moreover, it is infeasible to use different antennas for

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[270] *See* note 261 *supra* (citing federal court cases upholding Commission's exercise of ancillary jurisdiction).

[271] 47 U.S.C. § 303 note.

[272] *See* Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations, 59 Rad. Reg. 2d (P&F) 1073 (1986); Earth Satellite Communications, Inc., 95 FCC 2d 1223 (1983) (preempting "state and local regulation of SMATV systems . . . ha[s] the effect of interfering with, delaying, or terminating interstate and federally controlled communications services"), *aff'd sub nom. New York State Commission on Cable Television v. FCC*, 749 F. 2d 804 (D.C. Cir. 1984); Preemption of Local Zoning Regulation of Satellite Earth Stations, *Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 5809 (1996).

[273] *Louisiana Pub. Serv. Comm'n v.* FCC, 476 U.S. 355, 368-69 (1986) (*Louisiana PSC*) (citing *Hines v. Davidovitz*, 312 U.S. 52 (1941)).

[274] *Louisiana PSC*, 476 U.S. at 369 (citing *Fidelity Federal Savings & Loan Assn. v. De la Cuesta*, 458 U.S. 141 (1982) and *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984)).

[275] *Louisiana PSC*, 476 U.S. at 376 n.4.

interstate and foreign communications than for intrastate communications. Because fixed wireless antennas are used in interstate and foreign communications and their use in such communications is inseverable from their intrastate use,[276] regulation of such antennas that is reasonably necessary to advance the purposes of the Act falls within the Commission's authority. Our action is therefore fully consistent with the preemption principles set forth in *Louisiana PSC*.

108. Several local government organizations argue that an extension of the Commission's OTARD rules to restrict state and local government regulation of customer-end antennas used for transmitting or receiving telecommunications signals would violate Section 332(c)(7) of the Act.[277] Specifically, they argue that these antennas are "personal wireless service facilities" within the meaning of Section 332(c)(7), and that Section 332(c)(7) forbids the Commission from limiting state and local government regulation of such antennas except on the basis of RF emissions safety. In contrast, WCA argues that Section 332(c)(7) only applies to hub site antennas, and not to customer-end antennas.[278]

109. We believe that, in the context of Section 332(c)(7), the term "personal wireless service facilities" is best read not to include customer-end antennas. The Section defines "personal wireless service facilities" as facilities "for the provision of personal wireless services." Although the term taken by itself could be read to include customer-end facilities, a narrower reading which limits the term to a facility that "provides" the service, *i.e.*, the carrier hub site, is not only reasonable, but also, as discussed below, better reflects the statutory provisions and goals of the 1996 Act in general and those of Section 332(c)(7) in particular. Thus, we find that Section 332(c)(7) does not prevent the Commission from restricting state and local government regulation of these antennas. We note, though, that nothing in this decision affects the well-established rights of state and local governments under Section 332(c)(7) to regulate the placement, construction, and modification of carrier hub sites.[279]

110. Read in context with other provisions of the 1996 Act, Section 332(c)(7) is best construed to apply only to hub sites. In particular, reading Section 332(c)(7) so as not to reach customer-end antennas is more consistent with the simultaneous enactment of Section 207. The amendment of Section 332(c)(7) to preserve local zoning authority over personal wireless service facilities was enacted at the same time that Congress circumscribed local zoning authority over customer-end antennas used for

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[276] *See, e.g., National Ass'n of Regulatory Util. Comm'rs v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984) (stating that "purely intrastate facilities and services used to complete even a single interstate call may become subject to FCC regulation to the extent of their interstate use"); *cf. Louisiana PSC*, 476 U.S. at 376 n.4 (1986) (acknowledging that where it is "not possible to separate the interstate and the intrastate components of the asserted FCC regulation," FCC preemption is sustainable). The Communications Act defines "interstate communication" as any communication that originates in one state and terminates in another. 47 U.S.C. § 153(e).

[277] City and County of San Francisco Comments at 16; National Association of Counties, the National Association of Telecommunications Officers and Advisors, and Montgomery County, Maryland Joint Comments at 20; Reply Comments of Concerned Communities and Organizations at 20. LSGAC references the argument regarding Section 332(c)(7) in its Recommendation No. 19, issued November 1, 1999. Section 332(c)(7) states that "[e]xcept as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." 47 C.F.R. § 332(c)(7). Section 332(c)(7) expressly permits the Commission to regulate State or local government decisions of the siting of personal wireless service facilities on the basis of RF emissions safety.

[278] WCA Further Reply Comments at 14.

[279] *See, e.g., Communications Company of Charlottesville v. Board of Supervisors of Albemarle County*, 211 F.3d 79, 86 (4th Cir. 2000).

video services. Given that precisely the same customer-end antennas may be used for telecommunications services as are used for video services, it is unlikely that Congress would preserve local zoning authority over the one at the same time it limited local zoning authority over the other.

111. In addition, reading Section 332(c)(7) so as not to reach customer-end antennas is more consistent with Congress' use of the term "customer premises equipment" throughout the 1996 Act. In the 1996 Act, Congress defined "customer premises equipment" (CPE) as "equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications."[280] Congress thus did not include such equipment within the category of facilities used by carriers to provide telecommunications services. As a consequence, when Congress sought, in the 1996 Act, to cover CPE along with telecommunications equipment, it specified both CPE and telecommunications equipment.[281] Given Congress' express recognition in the 1996 Act of the Commission's longstanding deregulation of CPE and thus its fundamentally different character,[282] we find it particularly likely that Congress would have specifically referenced this equipment in Section 332(c)(7) if it had intended for this section to apply to that equipment.

112. Moreover, nothing in the legislative history indicates that Congress' preservation of local zoning authority was intended to extend to customer-end antennas. To the extent that the Conference Report gives examples of personal wireless service facilities, it references towers: "conferees do not intend that if a state or local government grants a permit in a commercial district, it must also grant a permit for a competitor's '50-foot tower' in a residential district."[283]

113. A narrower interpretation of "personal wireless service facilities" also best promotes the goals of the 1996 Act and Section 332(c)(7). One of the primary goals of the1996 Act was to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and to encourage the rapid deployment of new telecommunications technologies."[284] In particular, among other things, Congress sought to open the traditionally monopolistic local exchange and exchange access telecommunications markets to competitive entry.[285] Section 332(c)(7) promotes this goal by imposing certain limitations on state and

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[280] 47 U.S.C. § 153(14).

[281] *See, e.g.*, 47 U.S.C. § 255 ("A manufacturer of telecommunications equipment or customer premises equipment shall ensure that the equipment is designed, developed, and fabricated to be accessible to and usable by individuals with disabilities, if readily achievable."); 47 U.S.C. § 273 ("A Bell operating company may manufacture and provide telecommunications equipment, and manufacture customer premises equipment, if the Commission authorizes that Bell operating company or any Bell operating company affiliate to provide interLATA services under Section 271(d) . . . . [subject to requirements and exceptions].")

[282] See 47 U.S.C. § 549 (governing commercial consumer availability of equipment used to access services provided by multichannel video programming distributors). That section states: "Nothing in this section affects Section 64.702(e) of the Commission's regulations (47 C.F.R. 64.702(e)) or other Commission regulations governing interconnection and competitive provision of customer premise equipment used in connection with basic common carrier communications services." 47 U.S.C. § 549(d)(2).

[283] S. Conf. Rep. No. 104-230, 104th Cong., 2d sess. at 91 (1996) (1996 Act Conference Report).

[284] *1996 Act Preamble.*

[285] *See Local Competition First Report and Order*, 11 FCC Rcd at 15505-06, ¶ 3. Thus, in Section 251 of the Communications Act, Congress imposed special duties on LECs and incumbent LECs to take actions, including making their facilities and services available to competitors on reasonable terms, that would promote competition. 47 U.S.C. § (continued....)

local regulation of personal wireless service facilities siting while preserving local zoning authority generally. In particular, Section 332 (c)(7) provides that the regulation of the siting of personal wireless service facilities by a state or local government "(I) shall not unreasonably discriminate among providers of functionally equivalent services; and (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services."[286] Our action here is consistent with the spirit of this provision.

114. Fixed wireless technologies provide an alternative to the incumbent LECs' offering of basic and advanced services. In order for a customer to receive fixed wireless service at home or at the office, that customer must be able to place an antenna at the fixed site. To a much greater degree than is the case with the carrier hub site, there is little flexibility to place the antenna at another location. Thus, the inability of a customer to place an antenna at the customer's fixed site will result, with few exceptions, in the denial of fixed wireless service to that customer, whereas the inability of a carrier to place a hub site at a specific site will often not result in a denial of wireless service to customers in that area. Therefore, applying a blanket rule against most restrictions on the placement of these customer antennas is consistent with both the broad pro-competitive goals of the 1996 Act and the specific pro-competitive goals of the limitations on state and local regulation set forth in Section 332(c)(7). In particular, unreasonable restrictions on the placement of these antennas almost by definition both effectively prohibit the provision of personal wireless services and disadvantage providers of fixed wireless services as compared to their wireline competitors, thus unreasonably discriminating among providers of functionally equivalent services. Thus, the balance of the pro-competitive goals of the 1996 Act against the goal of preserving local authority is different for these antennas than for hub antennas, and it is reasonable to conclude, in light of the overriding Congressional intent to promote competition, that Congress did not contemplate including these antennas in Section 332(c)(7).

115. For similar reasons, we also think that reading Section 332(c)(7) to exclude customer-end antennas is more consistent with the judicial enforcement mechanism established for Section 332(c)(7) non-RF safety complaints regarding state or local government regulation. Requiring aggrieved parties (usually service providers) to seek a judicial remedy against an adverse local zoning decision involving a hub site was intended as an additional measure to preserve local authority. However, the burden on customers of having to litigate individual zoning decisions in court, as opposed to seeking an administrative remedy, would be substantially greater than the burden Section 332(c)(7) imposes on service providers. Thus, again, the balance among Congress' goals is different for customer-end antennas than for hub sites. For all these reasons, we conclude that customer-end antennas are not personal wireless service facilities within the meaning of Section 332(c)(7), and thus that Section 332(c)(7) does not preserve state and local authority over these antennas.

116. We also find that there is no constitutional impediment to our forbidding restrictions on the placement of antennas on property within the tenant user's exclusive use, where that user has an interest in the property.[287] In the *OTARD Second Report and Order*, we held that such rules as applied to

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251. In Section 271, Congress required the former Bell operating companies to meet a competitive checklist, and to demonstrate either the existence of facilities-based competition in the local exchange market or the absence of a request for access and interconnection to provide local exchange service, before they are allowed to provide in-region interLATA service. 47 U.S.C. § 271.

[286] 47 C.F.R. § 332(c)(7)(B)(i).

[287] *Cf.* Real Access Alliance Comments at vii. (arguing that the Commission has already exceeded its authority and violated the Fifth Amendment by extending the OTARD rules to include leased property and will further compound the error by extending the rules to include new services).

antennas used for the purposes specified in Section 207 did not effect a taking of the premises owner's property within the meaning of the Fifth Amendment because by leasing his or her property to a tenant, the property owner voluntarily and temporarily relinquishes the rights to possess and use the property and retains the right to dispose of the property.[288] Thus, none of the owner's property rights are effectively impacted by a permanent physical occupation of his property, because the landlord voluntarily relinquishes two of those rights (possessing and using) and is free to retain the third right (disposing of the property) when entering into a lease. Therefore, we did and do not believe that it constituted a *per se* taking to prohibit lease restrictions that would impair a tenant's ability to install, maintain, or use a Section 207 reception device within the leasehold. Indeed, we found that prohibiting restrictions on the installation of a satellite dish or other Section 207 device was indistinguishable in a constitutional sense from prohibiting restrictions on the installation of "rabbit ears" – a Section 207 reception device – on the top of a television set.[289] For similar reasons, we conclude that there is no taking here.

c. Other Issues

117. We recognize that today's revision of the OTARD rules will extend the benefits of that rules to fixed wireless devices that have the capability to transmit as well as receive signals. We emphasize that all FCC-regulated transmitters, including the subscriber terminals used in fixed wireless systems, are required to meet the applicable Commission guidelines regarding radiofrequency exposure limits.[290] We also reiterate that the OTARD rules provide an exception for "a clearly defined, legitimate safety objective" provided the objective is articulated in the restriction or readily available to antenna users and is applied in a non-discriminatory manner and is no more burdensome than necessary to achieve the articulated objectives.[291] We believe it is incumbent upon fixed wireless licensees, including satellite providers, to exercise reasonable care to protect users and the public from radiofrequency exposure in excess of the Commission's limits. Generally, we expect subscriber antennas to be installed so that neither subscribers nor other persons are easily able to venture into and interrupt the transmit beams. Such interruptions can degrade the quality of service to the subscriber and ultimately reduce the value of the carrier's service. Thus, providers have economic incentives to avoid temporary interruptions of signal quality that are likely to motivate them to install antennas in locations where such interruptions are less likely to occur.

118. In addition, as a condition of invoking protection under the OTARD rules from government, landlord, and association restrictions, a licensee must ensure that subscriber antennas are labeled to give notice of potential radiofrequency safety hazards of these antennas. We have previously adopted labeling requirements for LMDS, MDS, ITFS, and 24 GHz service antennas, which are types of transceivers that can be placed at a subscriber's premises.[292] Labeling information should include

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[288] *See* Implementation of Section 207 of the Telecommunications Act of 1996 and Restrictions on Over-the-Air Reception Devices: Television Broadcast, Multichannel Multipoint Distribution and Direct Broadcast Satellite Services, *Second Report and Order in CS Docket No. 96-83*, 13 FCC Rcd 23874, 23883-85, ¶¶19-20 (1998) (*OTARD Second Report and Order*). We note that this holding is being appealed in the U.S. Court of Appeals in the D.C. Circuit.

[289] *Id.*

[290] *See* Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation, ET Docket No. 93-62, *Report and Order*, 11 FCC Rcd 15123, 15124, 15152 (1996); 47 C.F.R. §§ 1.1307(b)(1), 1.1310.

[291] 47 C.F.R. §1.4000(b).

[292] *See* Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, To Reallocate the 29.5-30.0 GHz Frequency Band, To Establish Rules and Policies for Local (continued....)

minimum separation distances required between users and radiating antennas to meet the Commission's radiofrequency exposure guidelines. Labels should also include reference to the Commission's applicable radiofrequency exposure guidelines. In addition, the instruction manuals and other information accompanying subscriber transceivers should include a full explanation of the labels, as well as a reference to the applicable Commission radiofrequency exposure guidelines. While we will require licensees to attach labels and provide users with notice of potentially harmful exposure to radiofrequency electromagnetic fields, we will not mandate the specific language to be used. However, we will require use of the ANSI-specified warning symbol for radiofrequency exposure.[293]

119. Moreover, it is recommended that two-way fixed wireless subscriber equipment be installed by professional personnel, thereby minimizing the possibility that the antenna will be placed in a location that is likely to expose subscribers or other persons to the transmit signal at close proximity and for an extended period of time.[294] To the extent that local governments, associations, and property owners elect to require professional installation for transmitting antennas, the usual prohibition[295] of such requirements under the OTARD rules will not apply.[296]

120. We also note that the Commission plans to initiate a rulemaking proceeding to review and, where necessary, harmonize the Commission's regulations concerning transceiver equipment approval for radiofrequency exposure.

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Multipoint Distribution Service and for Fixed Satellite Service, CC Docket No. 92-297, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking* , 12 FCC Rcd 12545, 12670, ¶ 295 (1997) (*LMDS Order*); Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, MM Docket No. 97-217, *Report and Order*, 13 FCC Rcd 19112, 19129, ¶ 37 (1998) (*MDS/ITFS Order*); Amendment to Parts 1, 2, 87 and 101 of the Commission's Rules to License Fixed Services at 24 GHz, WT Docket No. 99-327, *Report and Order*, FCC 00-272 (rel. August 1, 2000); 47 C.F.R. § 1.1307(b)(1).

[293] *See Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Electromagnetic Fields*, FCC Office of Engineering and Technology (OET), OET Bulletin 65, August, 1997, at 53 (available at http://www.fcc.gov/oet/info/documents/bulletins/#65).

[294] *See, e.g., LMDS Order*, 12 FCC Rcd at 12670. We note that professional installation is in fact required for certain antennas used for MDS and ITFS under the Commission's rules. *See* 47 C.F.R. §§ 21.909(n), 74.939(p).

[295] *See, e.g., Declaratory Ruling In re MacDonald,* 13 FCC Rcd 4844, 4853, ¶ 28 (CSB, 1997) (prohibiting a local government regulation requiring OTARD users to hire an installer).

[296] In the LMDS and MMDS proceedings, we also strongly encouraged the use of safety interlock features on the subscriber units that would prevent a transceiver from continuing to transmit when blocked, to the extent that such features could be made available at a reasonable cost. *See LMDS Order*, 12 FCC Rcd at 12670, ¶ 296; *MDS/ITFS Order*, 13 FCC Rcd at 19129, ¶ 38; *see also* Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, MM Docket No. 97-217, *Report and Order on Reconsideration*, 14 FCC Rcd 12764, 12779, ¶ 29 (1999) (rules amended to provide for a positive "interlock" feature that prevents inadvertent activation of a newly installed response transmitter when the response antenna is not properly installed so as to receive signals from the associated main or booster transmitters). We do not preclude the possibility that requirements of such interlock features by State or local governments, home owner associations, building owners, or other third parties could under appropriate circumstances be justified under the safety exception in Section 1.4000(b) if the requirement promotes a clearly defined, legitimate safety objective and is no more burdensome than necessary. In addition, we do not preclude the possibility that the Commission could in the future require safety devices for some customer-end transmitters, such as those that transmit above some threshold level of radiated power.

121. Finally, we decline to prepare an environmental impact statement on the extension of the Commission's OTARD rules to customer-end antennas used for the transmission or reception of fixed wireless signals, as requested in a recently-filed petition by several municipal organizations.[297] With respect to the asbestos and other safety concerns raised by the petitioners,[298] we find that the exceptions in the OTARD rules for safety, which continue to apply to the revisions here, adequately address those concerns. [299] Specifically, Section 1.4000(b)(1) provides that any restriction otherwise prohibited by the OTARD rules is permitted if necessary to accomplish a clearly defined, legitimate safety objective and is no more burdensome than necessary to achieve that objective.[300]

122. With respect to the concerns regarding the effect of the extension of our OTARD rules on several species of birds that nest on rooftops and ledges,[301] we believe that the effect will be minimal because, as discussed above, our extension of the OTARD rules applies only to areas within the exclusive use or control of the antenna user and in which the antenna user has a direct or indirect ownership or leasehold interest.[302] Generally, antenna users do not have the requisite exclusive use or control over rooftops or ledges of the type or location described, such as in high-rise MDUs or MTEs. Moreover, to the extent that special cases do arise, they can be addressed under the waiver and declaratory ruling provisions of the rules.[303]

123. Regarding aesthetics concerns raised by petitioners,[304] we conclude that the environmental effects of the end-user facilities subject to the extension of the OTARD rules would be

[297] *See* National League of Cities, et al. Petition for EIS. We address petitioners' concern regarding issues related to Section 224 in para. 85 *supra*. To the extent that the EIS petition expresses concern regarding issues raised in the Notice of Inquiry portion of the *Competitive Networks NPRM*, those issues will be addressed separately at another time. *See* note 2 *supra*.

[298] *See* National League of Cities, et al. Petition for EIS at 16-24.

[299] *See* 47 C.F.R. § 1.4000(b)(1); para. 100, *supra*.

[300] See 47 C.F.R. § 1.4000(b)(1). We reject the petitioners' assertion that the Cable Services Bureau's *Star Lambert* decision "effectively read that exemption out of the rule (by prohibiting the enforcement of safety related codes and regulations against satellite dish providers." EIS Petition at v-vi. *See* Star Lambert and Satellite Broadcasting and Communications Association of America, *Memorandum Opinion and Order*, 12 FCC Rcd 10455 (CSB 1997) (*Star Lambert*). In that decision, the Bureau determined that the City of Meade, Kansas had not satisfied the safety exception to the OTARD rules because it had not sufficiently identified the type of safety concern it intended to address. *Star Lambert Order*, 12 FCC Rcd at 10469, ¶ 36 (noting that the Meade, Kansas zoning requirement made no more than passing reference to unspecified and general safety concerns). Moreover, the Bureau stated its concern that the general statement of safety interests in the Meade ordinance at issue was so broad and ill-defined that it constituted little more than a pro forma recitation. Thus, the *Star Lambert* decision did not prohibit the enforcement of all State and local safety codes as applied to antennas subject to the OTARD rules, but rather prohibited enforcement of such codes that do not accomplish a clearly defined, legitimate safety objective. Significantly, in the Commission's *OTARD Order on Reconsideration*, which was issued subsequent to the Meade decision, the Commission declined requests to cut back on the safety exception and reiterated the validity of recognizing legitimate safety concerns. *See OTARD Order on Reconsideration*, 13 FCC Rcd at 18968-71, ¶¶ 8-15.

[301] *See* National League of Cities, et al. Petition for EIS at 31-38.

[302] *See* para. 100, *supra*.

[303] *See* 47 C.F.R. §§ 1.4000(c), 1.4000(d).

[304] *See* National League of Cities, et al. Petition for EIS at 24-25.

minimal and not significant due to the limited size and location on the end user's premises, as discussed above.[305] We note that the OTARD rules provide, in addition to the safety exception, an exception for historic preservation.[306] As noted above, the OTARD rules also provide for governmental and non-governmental entities to seek a waiver of the application of OTARD to "address local concerns of a highly specialized or unusual nature."[307] Genuine concerns about environmental risks, if not already within the scope of the safety or historic preservation exceptions, may well be appropriate for consideration under this waiver provision.

124. In conclusion, we find that we should extend the OTARD rules by amending Section 1.4000 to include customer-end antennas used for transmitting or receiving fixed wireless signals. We recognize that the extension of the OTARD rules may not give every potential customer of fixed wireless service an effective right to place a covered antenna. In particular, the action we take today does not confer a right as against the building owner in restricted or common use areas in commercial or residential buildings, like most rooftops. However, although our rules generally would not apply to rooftop space in MDUs or MTEs, which typically is not exclusively used or controlled by tenants, the extension of our rules may give building owners stronger incentives to negotiate with competitive LECs to provide them with rooftop access on behalf of the tenants served by the competitive LECs. Under our rules, the tenant would have the right to place an antenna on sections of the MTE under the tenant's exclusive use or control, such as on the tenant's balcony. In some cases, as an alternative to balcony antennas, the building owner may consent to the placement of rooftop antennas.

V. FURTHER NOTICE OF PROPOSED RULEMAKING

A. Non-discriminatory Access Requirement

125. In addition to requesting comment on potential actions to promote competitive access to areas and facilities controlled by incumbent LECs, other utilities, and tenants, as well as on exclusive contracts, the Commission in the *Competitive Networks NPRM* sought comment on whether it should require building owners "who allow access to their premises to any provider of telecommunications services [to] make comparable access available to all such providers under nondiscriminatory rates, terms and conditions."[308] We stated our concern that premises owners may be unreasonably discriminating among competing telecommunications service providers and that such discrimination may be an obstacle to competition and consumer choice. The Commission also sought comment on whether it had the statutory authority to promulgate such a requirement, how such a requirement should be structured, whether such a requirement could be structured so that it would comply with the 5th Amendment Takings Clause of the U.S. Constitution, and whether there were practical issues associated with implementing a nondiscriminatory access requirement.[309] We received substantial comment on these issues.

126. We expect the specific actions that we take in today's Report and Order will reduce the likelihood that incumbent LECs can obstruct their competitors' access to MTEs, as well as address

[305] *See* para. 100, *supra.*

[306] *See* 47 C.F.R.§ 1.4000(b)(2).

[307] 47 C.F.R. § 1.4000(c).

[308] *Competitive Networks NPRM,* 14 FCC Rcd at 12701, ¶ 53.

[309] *Id.* at 12701-07, ¶¶ 53-63.

particular anticompetitive actions by premises owners and other third parties. We remain concerned, however, that, based on the record, the ability of premises owners to unilaterally and unreasonably discriminate among competing telecommunications service providers remains an obstacle to competition and consumer choice. We are encouraged by the real estate industry's recent initiative to develop and promote model contracts and best practices for providing building access. In particular, the industry's efforts have focused on the following issues: (1) adopting a firm policy not to enter into any exclusive contracts for building access in the future; (2) committing to procedures and appropriate timeframes for processing tenant requests for a particular telecommunications provider where appropriate space is available and the provider intends to execute an access agreement that is substantially in the form of a model contract to be developed by the industry; (3) incorporating these processing guidelines in new leases and notices to existing leaseholders; (4) committing to a clearer and more predictable process for responding to requests from carriers to access the MTE to serve customers, where the carrier agrees that its access to the MTE is conditioned on providing service to tenants by a date certain;[310] (5) facilitating the establishment of an independent clearinghouse to which interested parties could submit allegations of behavior that is inconsistent with either the model contracts or "best practices" developed as part of this initiative; and (6) supporting a periodic, quantitative study of the market for building access, to be conducted under the auspices of the Commission.[311] We believe that it is prudent to permit additional time for this initiative to develop, in the hope that the industry can address MTE access issues without further regulatory intervention. We will closely monitor these industry efforts, as well as the development of competition in the market for the provision of telecommunications services in MTEs. We stress that if such efforts ultimately do not resolve our concerns regarding the ability of premises owners to discriminate among competing telecommunications service providers, and such concerns are not resolved by other market forces, we will consider adopting a nondiscriminatory access requirement.

127. To that end, we now seek comment on several additional issues related to the imposition of a nondiscriminatory access requirement. First, because it is essential to have up-to-date market information when evaluating the necessity of such a requirement, we seek to refresh the record on the status of the market for the provision of telecommunications services in MTEs. Second, we note that our specific requests for comments in the *Competitive Networks NPRM* focused primarily on placing a nondiscriminatory access requirement directly on building owners. In some recent filings,[312] a number of

[310] *Id.*

[311] *See* September 6 Real Access Alliance Letter.

[312] *See* Addendum to ALTS Comments at 43-48 (discussing possible ways in which "[t]he Commission can secure tenant access to telecommunications options without imposing requirements directly upon MTE owners and managers"); Letter from Jonathan Askin, Counsel for ALTS, to Magalie Roman Salas, Secretary, FCC, dated April 12, 2000 (noting that "[t]hat the Commission can accomplish MTE access indirectly through its authority to regulate providers of interstate communications. Specifically, it should prohibit carriers from serving MTEs owners or operated by owners or managers that discriminate among telecommunications carriers or otherwise unreasonably restrict access by telecommunications carriers to the tenants in those MTEs. Alternatively, the Commission could prohibit carriers from entering into contracts with MTE owners or managers that provide or allow for discriminatory or unreasonable treatment of other carriers."); Letter from Gunnar Halley, Counsel for Teligent, to Magalie Roman Salas, Secretary, FCC, dated April 28, 2000 (noting that the Commission "may impose suitable obligations upon [carriers] that have the effect of influencing multi-tenant environment owner behavior" and citing *Ambassador, Inc. v. United States*, 325 U.S. 317 (1945) (*Ambassador*)); Letter from Philip L. Verveer, Counsel for WinStar Communications, Inc., to Commissioner Powell, dated June 22, 2000, filed in WTB 99-217 (noting that "[t]he Commission may exercise its jurisdiction over carriers' practices in order to ensure access to buildings on nondiscriminatory and reasonable terms").

competitive carriers advocate the legal argument that, were we to impose a nondiscriminatory access requirement, we could instead place the obligations attendant with such a requirement on local telecommunications providers. We believe that a strong case can be made that the Commission has authority under this theory to impose a requirement on such carriers falling under the jurisdiction of the Commission. We seek comment on this argument as well as on whether it would be prudent to exercise that authority. That decision would be informed by the results of the updated market and technological information we are seeking, and must also take into account possible constitutional and implementation issues. Thus, we seek comment on those sets of issues as well.

1. Update on the State of the Market

128. Although, as noted above, there has been some significant progress toward competition in the market for local telecommunications services,[313] we remain concerned by the possibility that the regulatory changes that we are adopting in this order may ultimately prove insufficient to ensure that this progress continues at an adequate pace. Consequently, at some point in the future, it may still prove necessary to consider imposing a nondiscriminatory access requirement following the FNPRM proceeding. In that light, we encourage interested parties to comment on developments affecting competitive provision of telecommunications services in MTEs so that we can continue to evaluate and monitor the need for such a requirement in light of conditions in the marketplace. In addition, we seek to monitor closely the progress of the real estate industry's initiative to develop and promote both model contracts and "best practices" for acquiring building access, as discussed in paragraph 2, *supra*. We urge the real estate industry to provide additional information on the status and scope of this initiative as it is developed and implemented. We also seek comment from other interested parties, including tenants[314] and competitive LECs, on the progress that has been made through this initiative.

129. In particular, we seek data regarding the state of the market including, but not limited to, the following: (1) the number of MTEs to which competitive LECs have requested access, along with information regarding the characteristics of those MTEs (*e.g.*, number of units; types of use, including commercial, residential, and mixed use MTEs; urban vs. suburban); (2) the number of MTEs to which multiple carriers have obtained access, and the characteristics of those MTEs; (3) the number of local telecommunications service providers that have obtained access to these MTEs and the technologies that they employ (*e.g.*, wireless vs. wireline); (4) among competing carriers that have obtained access to MTEs, the percentage of these MTEs in which they are actually providing services; (5) the average length of time from an initial request for MTE access until the successful conclusion of contract negotiations, along with information regarding how often, by how much, and for what reasons this varies; (6) the number of MTEs in which a request for competitive access has been denied either by an MTE owner or manager or by a LEC, the average length of time from an initial access request until a denial, and the asserted bases for these denials; (7) the average length of time from the initial access request that

[313] *See* paras. 14 -24, *supra*.

[314] We note that we recently received two *ex parte* submissions from groups representing the interests of consumers. In its submission, AARP asserts that "[t]enants, not landlords and building owners, should have the opportunity to choose among carriers for their telecommunications services." Letter from Martin Corry, Director, Federal Affairs, AARP, to William E. Kennard, Chairman, FCC, dated September 20, 2000. Similarly, the Consumers Union asserts that "occupants of MTEs should have the right to select from a variety of carriers. . . . . [J]ust compensation does not require that property owners be allowed to block the expansion of local phone competition." Letter from Gene Kimmelman, Co-Director, Washington Office, Consumers Union, to William E. Kennard, Chairman, FCC, dated September 19, 2000.

currently pending access requests have been outstanding; (8) any differences in the length of negotiations, the nature of the negotiations, or the frequency of denials based on whether a competitive LEC is seeking access in response to a service request from a specific tenant; (9) the charges imposed for different types of access to MTEs and the basis on which such charges are determined; (10) state laws or regulations requiring or encouraging nondiscriminatory access, and the nature of those laws or regulations; (11) the experiences of carriers, building owners, and end users in states that have promulgated nondiscriminatory access requirements, including the numbers and types of complaint and enforcement actions that have been filed; and (12) technological developments, such as free-space optical technology,[315] that may obviate or reduce the need for carriers to obtain direct access to intrabuilding facilities.

130. We believe that any future assessment of the market would be best guided by information that measures the current state of the market and the market after a reasonable period of time has passed after the implementation of the Report and Order and the best practices proposed by the real estate industry. We authorize the Wireless Telecommunications Bureau to issue a public notice requesting information be submitted eight months from the release of the FNPRM. This period should provide the Commission with the opportunity for updating the record with relevant market information that will better enable us to gauge overall competitive market trends.

2. Legal Issues

131. As discussed above, based on competitive developments in the market for the provision of telecommunications services in MTEs, and in response to the measures we adopt today, we may consider adopting a nondiscriminatory access requirement in the future. To that end, we will examine and seek further comment on issues relating to our legal authority.

a. Statutory Authority

132. Based upon our review of the relevant authority, we believe that there is a strong case that the Commission has the statutory authority to prohibit LECs from providing service to MTEs whose owners maintain a policy that unreasonably prevents competing carriers from gaining access to potential customers located within the MTE. This section sets forth the relevant legal framework for this theory.

133. As a preliminary matter, we observe that regulating LECs in this manner could encourage competition in the exchange access market, a market in which LECs provide customers with a segment of interstate telephone service.[316] We note that, to the extent a local carrier provides exchange access to originate or terminate interstate telecommunications, the services and the facilities used for that purpose fall within the Commission's jurisdiction under its mandate for regulating interstate communications.[317]

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[315] For example, TeraBeam Internet, a jointly-owned venture of Lucent and TeraBeam Networks, is developing a fiberglass network technology that can send data through the windows of office buildings using optical beams. *See* Communications Daily, April 13, 2000.

[316] The Communications Act defines "exchange access" as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." 47 U.S.C. § 153(16).

[317] *See, e.g., National Ass'n of Regulatory Util. Comm'rs v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984) (stating that "purely intrastate facilities and services used to complete even a single interstate call may become subject to FCC regulation to the extent of their interstate use"); *cf. Louisiana PSC*, 476 U.S. at 376 n.4 (acknowledging that where it (continued....)

134. It is well established that the Commission has broad authority to regulate the practices of LECs in connection with their provision of interstate communications services. In addition to the general authority specified in Title I of the Communications Act,[318] Title II provides a specific, substantive framework for the Commission's regulation of such practices. Thus, Section 201(b) mandates that "[a]ll charges, practices, classifications, and regulations for and in connection with such [interstate or foreign] communication [by wire or radio] service, shall be just and reasonable," and then the section gives the Commission the power to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of the Act."[319] Similarly, Section 202(a) declares that "[i]t shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communications service, directly or indirectly, by any means or device." 47 U.S.C. § 202(a). Finally, Section 205(a) authorizes the Commission "to determine and prescribe . . . what . . . practice is or will be just, fair, and reasonable" where it is of the opinion that a common carrier practice "is or will be in violation of any of the provisions of this Act."[320]

135. When a LEC provides service to an MTE on terms that place its competitors at an unfair competitive disadvantage, this practice – which serves to insulate the LEC from competitive pressures in a sizable portion of its market – may not qualify as either just or reasonable.[321] We note that, in a

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is "not possible to separate the interstate and the intrastate components of the asserted FCC regulation," FCC preemption is sustainable). The Communications Act defines "interstate communication" as any communication that originates in one state and terminates in another. 47 U.S.C. § 153(e).

[318] Under Section 1, the Commission is charged with "execut[ing] and enforc[ing] the provisions of th[e Communications] Act," 47 U.S.C. § 151, the provisions of which "apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States." 47 U.S.C. § 152(a). Section 2(a) makes it clear that the Act applies to the LECs: "The provisions of this act shall apply to . . . all persons engaged within the United States in such communication or such transmission of energy by radio." 47 U.S.C. § 152(a). Moreover, Section 4(i) provides the Commission with general authority to promulgate regulations that are necessary to perform its functions: "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). The Commission's mandate under Title I has justified regulation of common carrier activities that are not specifically addressed in Title II. *See, e.g., Rural Tel. Coalition v. FCC*, 838 F.2d 1307 (D.C. Cir. 1988) (upholding Commission's pre-statutory version of the universal service fund as ancillary to its responsibilities under Sections 1 and 4(i) of the Communications Act, stating that "[a]s the Universal Service Fund was proposed in order to further the objective of making communications service available to all Americans at reasonable charges, the proposal was within the Commission's statutory authority"); *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 731 (2d Cir. 1974) (holding that "even absent explicit reference in the statute, the expansive power of the Commission in the electronic communications field includes the jurisdictional authority to regulate carrier activities in an area as intimately related to the communications industry as that of computer services, where such activities may substantially affect the efficient provision of reasonably priced communications service").

[319] 47 U.S.C. § 201(b); *see also* 47 U.S.C. § 303(r) (stating that the Commission shall "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of the Act").

[320] 47 U.S.C. § 205(a).

[321] *Cf. Ambassador, Inc. v. U.S.*, 325 U.S. 317 (1945). In the *Ambassador* case, the Supreme Court held that the Commission's supervisory power was not limited to rates and services, but also, under Section 201(b), extended to practices in connection with such service. *Id.* at 323. The practices at issue involved the terms of telephone company tariff filings, which regulated the relationship that the telephone subscribers had with their third party (continued....)

separate context, the Commission's International Settlements Policy (ISP) mandates that, pursuant to Section 201, all charges and practices of U.S. international carriers be just and reasonable, including a requirement that U.S. carriers receive non-discriminatory treatment from dominant foreign carriers.[322] The Commission has observed that the exchange access market is one of the "last monopoly bottleneck strongholds in telecommunications," and that opening it up to competition will "bring new packages of services, lower prices and increased innovation to American consumers."[323] Without reasonable access to end users for new entrants, the benefits of competition (*e.g.*, more advanced services, reasonable prices, better service to consumers, greater range of choices of service) will not develop fully, thus undermining the express Congressional goal of creating for all Americans an efficient communication system that provides good service at reasonable prices.[324] Under these circumstances, we believe that there is a strong case that the Commission has the requisite authority, under Section 205(a) of the Act, to promulgate a regulation that bars the practice that contributes to this result.[325] We seek comment on the Commission's potential application of Section 205(a), as well as the other relevant provisions of Title II, to prohibit the LEC practices described above that could result in competitive market distortions. Of course, in making the ultimate determination whether to adopt such a policy in this context, the Commission must consider relevant constitutional and marketplace issues, as discussed elsewhere in this item.

136. We recognize that the regulation under discussion here would have an indirect effect on the behavior of the owners of MTEs. While we have asked questions in this proceeding about our statutory authority to regulate MTE owners directly,[326] it does not appear that the same issues would arise from a direct carrier regulation that has indirect effects on the MTE owners. We note that significant

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customers. Specifically, the tariffs stated that provision of telephone service was conditioned on the private branch exchange ("PBX") subscribers (*i.e.*, hotel, apartment house and club owners) not charging their guests any fee in addition to the telephone company's message toll charges for use of the service. The Supreme Court recognized the Commission's authority to review whether the telephone companies' requirements (filed with and reviewable by the Commission pursuant to Section 203) directly affecting the relationship between their subscribers and third parties were "just and reasonable" practices under Section 201(b), and whether use of the tariffs "perpetrate[d] an unjust or unreasonable discrimination or preference" under Section 202. *Id.* The Court stated that these Sections "clearly authorize the [telephone] companies to promulgate rules binding on PBX subscribers as to the terms upon which the use of the facilities may be extended to others not themselves subscribers." *Id.*

[322] The ISP requires: (1) that U.S. carriers receive the same accounting rate from dominant foreign carriers; (2) that the accounting rate be divided evenly between a U.S. carrier and a dominant foreign carrier; and (3) that U.S. carriers receive a proportionate share of return traffic from dominant foreign carriers. 1998 Biennial Regulatory Review Reform of the International Settlements Policy and Associated Filing Requirements, *Report and Order and Order on Reconsideration*, IB Docket No. 98-148, 14 FCC Rcd 7963 (1999).

[323] *Local Competition First Report and Order*, 11 FCC Rcd at 15506.

[324] *See* 47 U.S.C. § 151 (stating that purpose of Commission regulation under Act is "to make available to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges").

[325] 47 U.S.C. § 205(a); *see also Western Union Telegraph Company v. FCC*, 665 F.2d 1126, 1151 (D.C. Cir. 1981) (rejecting argument that Section 205(a) requires formal evidentiary hearing, stating that "[i]t is settled law that FCC policy decisions impacting, but not setting, rates may, when appropriate, be made in an informal rulemaking rather than in an adjudicatory ratemaking proceeding").

[326] *See Competitive Networks NPRM*, 14 FCC Rcd at 12703-04, ¶¶ 57-58.

precedent might support the Commission's authority to proceed in this manner, and we seek comment on the potential application of this precedent.

137. Most recently, the Commission addressed the effects of certain foreign telecommunications carrier practices, which were causing competitive distortions in the marketplace and thus adversely affecting the prices for communications services ultimately paid by U.S. citizens. The Commission, in its *International Settlement Rates Order*,[327] placed certain requirements on U.S. carriers that had an indirect impact on the rates charged by foreign carriers. Specifically, the Commission established benchmark settlement rates that the domestic carriers were allowed to pay foreign carriers for termination of international traffic originating in the United States, and prohibited U.S. carriers from entering into any agreements with foreign carriers if the fees charged by the foreign carriers exceeded a benchmark level.

138. In affirming the Commission, the U.S. Court of Appeals for the District of Columbia Circuit rejected claims that the Commission had exceeded its authority because its action affected the foreign carriers:

> To be sure, the practical effect of the Order will be to reduce settlement rates charged by foreign carriers. But the Commission does not exceed its authority simply because a regulatory action has extraterritorial consequences. . . . Indeed, no canon of administrative law requires us to view the regulatory scope of agency actions in terms of their practical or even foreseeable effects.

Cable & Wireless P.L.C. v. FCC, 166 F.3d 1224, 1230 (D.C. Cir. 1999) (citations omitted).

139. This approach is also consistent with earlier precedent, such as *Radio Television S.A. de C.V. v. FCC*, 130 F.3d 1078 (D.C. Cir. 1997) (upholding requirement that Mexican affiliate of U.S. broadcast network air issue-responsive programming in order for U.S. network to qualify for Section 325 permit to transmit signals to foreign station for rebroadcast into the United States), and Network Television Broadcasting, *Report and Order* in Docket No. 12782, 23 FCC 2d 382 (1970) (creating indirect limits on television broadcast network control by regulating the licensed network affiliates), *affd sub nom. Mt. Mansfield Television, Inc. v. FCC*, 442 F. 2d 470 (2d Cir. 1971).

140. Moreover, in *Ambassador*, discussed at note 316 *supra*, the Supreme Court upheld the Commission's exercise of jurisdiction over surcharges imposed by hotels, apartment houses and clubs on end user guests and tenants for interstate and foreign telephone calls. The owners of these multiple tenant environments would typically use a private branch exchange (PBX) system, installed and owned by the telephone company, to route incoming and outgoing calls for guests, and to connect guests to points within the hotel or apartment. Although the hotel owners provided their guests with various services in connection with this system (*e.g.*, secretarial services such as message taking, message routing, message screening) and paid the telephone company monthly charges for the use of the system, the surcharges at issue in this case were calculated on a per call basis, varying in accordance with the toll charge made by the telephone company for the communications service.

141. The Commission had concluded that the hotel owners were serving as agents for the telephone companies and that these surcharges must therefore be reflected in tariffs filed by the telephone companies.[328] The telephone companies then filed tariffs stating that service to the hotels and

[327] International Settlement Rates, *Report and Order*, IB Docket No. 96-261, 12 FCC Rcd 19806 (1997).

[328] *See* Special Telephone Charges of Hotels, *Report of the Commission*, Docket No. 6255, 10 FCC 252, 264 (1943).

apartment houses was conditioned on those entities not imposing any such surcharges. The hotel and apartment house interests appealed, and the district court sustained the validity of the tariff without relying on the view that the hotels/apartment houses were agents of the telephone companies. (The court termed them subscribers.) The case was appealed directly to the Supreme Court, which affirmed. The Court held that the Commission's authority permits it to oversee the conditions placed by telephone companies on their subscribers, stating:

> The Communications Act of 1934 recognizes that tariffs filed by communications companies may contain regulations binding on subscribers as to the permissible use of the rented communications facilities. The supervisory power of the Commission is not limited to rates and to services, but the formula oft repeated in the Act to describe the Commission's range of power over the regulated companies is "charges, practices, classifications, and regulations for and in connection with such communication service." 48 Stat. 1070 U.S.C. § 201(b), 47 U.S.C.A. § 201(b). It is in all of these matters that the Act requires the filed tariffs to be "just and reasonable" and declares that otherwise they are unlawful. By none of these devices may the companies perpetrate an unjust or unreasonable discrimination or preference. All of these must be filed with the Commission in the form it prescribes, may not be changed except after due notice, and must be observed in the conduct of its business by the company. These provisions clearly authorize the companies to promulgate rules binding on PBX subscribers as to the terms upon which the use of the facilities may be extended to others not themselves subscribers.

Ambassador, 325 U.S. at 323 (footnotes omitted).

142. According to the Court, the main limitation on the use of regulation to affect the behavior of hotel owners is that the "telephone companies may not, in the guise of regulating the communications service, also regulate the hotel or apartment house or any other business." *Id.* The mere fact, however, that a regulation affects the hotel's dealings with third parties does not invalidate the regulation:

> But where a part of the subscriber's business consists of retailing to patrons a service dependent on its own contract for utility service, the regulation will necessarily affect, to that extent, its third party relationships. Such a regulation is not invalid per se merely because, as to the communications service and its incidents, it places limitation upon the subscriber as to the terms upon which he may invite others to communicate through such facilities.

Id. at 323-24.[329]

143. Similarly, the purpose behind the regulation under discussion here bears directly on communications services and is focused on the state of the communications market;[330] the Commission would be prohibiting LECs from dealing with MTEs that discriminate among providers of

[329] The Court went on to conclude that, given the fact that the hotels' surcharges on their guests were not based on the service rendered by the hotel, but rather varied in accordance with the toll charge made by the telephone company for communications service, these charges were "so identified with the communications service that they are brought within the prohibitions of this regulation." *Id.* at 324.

[330] *Cf. GTE Service Corp.*, 474 F.2d at 730 (holding that, in light of the threat that common carriers' expansion into computer data processing posed to the efficiency of the communications market and the reasonableness of prices therein, the Commission had the authority to regulate the entry of such carriers into the non-regulated field of data processing services).

telecommunications services in order to ensure that the interstate communications market becomes more competitive and that the rates charged and services provided to the public are just and reasonable. We seek comment on whether a LEC's provision of service to MTEs is sufficiently closely related to an MTE owner's unreasonable discrimination that we can and should exercise jurisdiction over the LEC's practice. We also note that Section 411 of the Act grants us authority to include non-carriers as parties in enforcement proceedings.[331] If we decide to adopt a nondiscriminatory access obligation, we also seek comment on the application of Section 411(a) regarding joinder of MTE owners as parties to any Commission action enforcing such a regulation.

b. Constitutional Issues

144. In the *Competitive Networks NPRM*, we raised a series of questions about the constitutionality under the Fifth Amendment of imposing a nondiscrimination requirement directly on the owners of MTEs.[332] We similarly ask here for comment on the constitutionality of barring the LECs from dealing with MTE owners who maintain a discriminatory policy against competing carriers, and on ways to mitigate any constitutional problems that might exist.[333] While we do not perceive that there are any takings issues with respect to the LECs (since the proposed regulation would not involve use or occupation of LEC property), we acknowledge that the regulation would almost certainly influence MTE owners to act in a manner similar to that which would be required by direct regulation. To the extent that a direct regulation would constitute a Fifth Amendment *per se* taking, there is some suggestion in the case law that an indirect regulation that leaves the third party no choice but to submit to the same basic result would also constitute an unconstitutional taking.[334] In evaluating a rent control ordinance, however, the Supreme Court, in *Yee v. City of Escondido*, 503 U.S. 519 (1992), drew a distinction between a direct requirement that a landowner submit to the physical occupation of his land (which, if uncompensated, would work a *per se* taking in violation of the Fifth Amendment), and a rental requirement that, *inter alia*, barred a mobile park owner from disapproving of the transfer of a mobile home from one tenant to the next (provided the purchaser has the ability to pay the rent). The Court stated:

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[331] Section 411(a) provides as follows: "In any proceeding for the enforcement of the provisions of this Act, . . . it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the charge, regulation, or practices under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers." 47 U.S.C. § 411(a).

[332] *See Competitive Networks NPRM*, 14 FCC Rcd at 12704-05.

[333] *See, e.g., id.* at 12705 (asking, *e.g.*, if constitutional problems might be mitigated if a requirement were tailored to apply only where the property owner has already permitted another carrier physically to occupy its property, or if the requirement enabled the property owner to obtain from a new entrant the same compensation that it had voluntarily agreed to accept from an incumbent LEC).

[334] *See, e.g., Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600, 605 (11th Cir. 1992). The court noted, in dicta, that if Section 621(a)(1) of the Communications Act were construed to require cable company access in cases where the property owner had previously and privately agreed to provide compatible access to others, the court "would have substantial reservations regarding the constitutionality of the Cable Act." *Id.* The court explained that "[b]ecause every modern apartment building is linked to electric, telephone, and/or video programming services, the district court's interpretation [upon which the court of appeals did not need to pass] effectively grants franchised cable companies the same unencumbered right of access to private property which the Supreme Court held to be a compensable taking in *Loretto* [*v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)]." *Id.*

> At least on the face of the regulatory scheme, neither the city nor the state compels petitioners, once they have rented their property to tenants, to continue doing so. To the contrary, the Mobile Home Residency Law provides that a park owner who wishes to change the use of his land may evict his tenants, albeit with 6 or 12 months notice. . . . Put bluntly, no government has required any physical invasion of petitioners' property.

Id. at 527-28 (citation omitted).[335]

145. We ask for comment on the effect of the foregoing case law on the potential regulation at issue here. In particular, we are interested in whether, in light of this case law, an obligation imposed on LECs in their dealings with property owners would effect a taking from property owners. As indicated above, however, even if such a regulation in unqualified form would present constitutional problems, there may be ways of modifying the regulation to mitigate these problems. In addition to the approaches specifically mentioned in paragraph 60 of the *Competitive Networks NPRM*, we also ask whether the constitutional concerns would be answered completely if the Commission provided a judicially reviewable mechanism for ensuring that the property owners received "just compensation" commensurate with what the Fifth Amendment might require in takings situations. In *Gulf Power I*, the court rejected a facial challenge to the constitutionality of Section 224(f) of the Communications Act, ruling that this provision, although working a taking, passed constitutional muster because the statute itself provided for the possibility of just compensation to the plaintiff utilities. Section 224(f) is a mandatory access provision, which states that "[a] utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." 47 U.S.C. § 224(f)(1). Under the statutory scheme, the Commission has the authority to review the rates and terms of pole attachments agreements between utilities and cable systems or telecommunications carriers (provided such matters are not regulated by a state) under certain guidelines provided for in the statute. The Commission's determinations in these regards are, of course, judicially reviewable.

146. The court in *Gulf Power I* upheld this basic approach, ruling that it was not facially unconstitutional under the Fifth Amendment "because, at least in most cases, it ensures a utility does not suffer that taking without obtaining just compensation." *Id.* at 1338. In so ruling, the court made it clear that an agency could determine the amount of compensation in the first instance, so long as that determination was judicially reviewable on constitutional grounds:

> [T]he Supreme Court has stated that "all that is required is that a reasonable, certain, and adequate provision for obtaining compensation exist[s] at the time of the taking. If the government has provided an adequate process for obtaining compensation, and if resort to that process yields just compensation, then the property owner has no claim against the Government for a taking." Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. at 194-95, 105 S.Ct. at 3120-21 (citation and quotation omitted). While a process in which the judicial branch does not make the final determination of what constitutes just compensation may be constitutionally inadequate, we see no constitutional problem with a process that employs an

[335] *See also Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) (holding that prohibition of the sale of eagle feathers was not a taking as applied to traders of bird artifacts because the challenged regulations did not compel surrender of the artifacts, there was no physical invasion or restraint upon the artifacts, and appellees retained the rights to possess, transport, donate or devise the protected birds; "loss of future profits – unaccompanied by any physical property restriction provides a slender reed upon which to rest a takings claim."); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (holding that nondiscrimination provision under Title VII of the Civil Rights Act of 1964, requiring general access to places of public accommodation, did not constitute taking of property).

> administrative body, such as the FCC, to determine just compensation in the first instance. Indeed, use of an administrative body with some technical expertise over the subject matter of the property to be valued likely will aid the judiciary in arriving at a more reliable determination of the proper level of just compensation. So long as an administrative body's decision concerning the level of compensation owed for a taking remains subject to judicial review to ensure just compensation, use of an administrative body can be a valid part of "provid[ing] an adequate process for obtaining compensation." *Id.*

Gulf Power I, 187 F.3d at 1333.

147. Given the analysis above, we request comment on whether the constitutional concerns regarding a nondiscrimination requirement (either indirect or direct) would be resolved if the Commission were to specify that an MTE policy is not discriminatory merely because it requires a competing carrier to pay "just compensation" to the building owner for access, and if the Commission's review of the policy were subject to judicial review. Similarly, we ask whether a similar compensation mechanism would resolve questions over the constitutionality of a direct regulation on the owners of MTEs.

148. We recognize that the regulatory framework before the court in *Gulf Power I* was based on a statute that specified a compensation mechanism, unlike the compensation approach under discussion here. While the absence of a statutorily mandated compensation mechanism led the court in *Bell Atlantic Telephone Companies v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994), to invalidate Commission orders requiring LECs to permit competitive access providers ("CAPs") to connect their facilities to the LEC network through physical collocation (at a rate set by tariff), the critical problem for the *Bell Atlantic* court was not the failure of the statute to specify a compensation mechanism *per se*, but that the ultimate surety for providing just compensation rested on Tucker Act claims that Congress had not specifically authorized.

149. To elaborate, in *Bell Atlantic*, the court was evaluating the Commission's implementation of Section 201(a) of the Communications Act, which creates a common carrier duty "to establish physical connections with other carriers" if the Commission "finds such action necessary or desirable in the public interest." 47 U.S.C. § 201(a). Construing this provision, the Commission recognized a right on the part of competing carriers to physically co-locate equipment on the incumbent carrier's property. The court observed that the Commission's rules allowed the LECs to file new tariffs under which they would obtain compensation from their competitors for the "reasonable costs" of co-location, but not necessarily for the level of compensation required by the Fifth Amendment (*i.e.*, "just compensation"). Thus, if the compensation required by the tariff were lower than the Fifth Amendment "just compensation," the LEC would not be entitled under any Commission rule to recover the difference from the competitor. Instead, the government would face liability: "But in fact the LECs would still have a Tucker Act remedy for any difference between the tariffs set by the Commission and the level of compensation mandated by the Fifth Amendment." *Bell Atlantic*, 24 F.3d at 1445 n.3. It was this concern over the exposure of the Treasury "to liability both massive and unforeseen," *id.* at 1445, that led the court to voice concerns that the agency's interpretation of the statute would encroach on Congress's exclusive powers to raise revenue and appropriate funds, which, in turn, led to the court's narrowing construction of the statute under the avoidance canon.[336]

[336] Under the avoidance canon, a court will narrow an agency's construction of a statute in order to avoid substantial constitutional questions. The court in *Bell Atlantic* explained that "when 'there is an identifiable class of cases in which application of [the] statute will necessarily constitute a taking,'" the avoidance canon should take effect. *Bell* (continued....)